104

MEASURES PASSED BY STATE REFERENDUM

Y 4. J 89/1: 104/17

DEPOSITORY

Measures Passed by State Referendum...

FEB 28 1996

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1170

TO PROVIDE THAT CASES CHALLENGING THE CONSTITUTIONALITY OF MEASURES PASSED BY STATE REFERENDUM BE HEARD BY A 3-JUDGE COURT

APRIL 5, 1995

Serial No. 17

Printed for the use of the Committee on the Judiciary

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CONTENTS

HEARING DATE

Page

April 5, 1995 1

TEXT OF BILL

H.R. 1170 3

OPENING STATEMENT

Moorhead, Hon. Carlos J., a Representative in Congress from the State of California, and chairman, Subcommittee on Courts and Intellectual Property 1

WITNESSES

Edwards, Hon. Harry T., Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit 24
Maier, Harold G., professor of law, David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law 16
Neuborne, Burt, John Norton Pomeroy Professor of Law, New York University School of Law 33

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Bono, Hon. Sonny, a Representative in Congress from the State of California
Letter dated April 3, 1995, from former Attorney General William P. Barr 54
Prepared statement 9
Edwards, Hon. Harry T., Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit: Prepared statement 31
Lungren, Daniel E., attorney general, State of California: Prepared statement 13
Maier, Harold G., professor of law, David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law: Prepared statement 18
Mecham, L. Ralph, Secretary, Judicial Conference of the United States: Prepared statement 12
Meese, Edwin, III, Ronald Reagan Fellow in Public Policy, the Heritage Foundation: Prepared statement 53
Neuborne, Burt, John Norton Pomeroy Professor of Law, New York University School of Law: Prepared statement 35
Schroeder, Hon. Patricia, a Representative in Congress from the State of Colorado: Prepared statement 7

MEASURES PASSED BY STATE REFERENDUM

WEDNESDAY, APRIL 5, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, F. James Sensenbrenner, Jr., Bob Goodlatte, Sonny Bono, George W. Gekas, Charles T. Canady, Martin R. Hoke, Patricia Schroeder, John Conyers, Jr., Howard L. Berman, and Xavier Becerra.

Also present: Thomas E. Mooney, chief counsel; Joseph V. Wolfe, counsel; Mitch Glazier, assistant counsel; Sheila Wood, clerk; Betty Wheeler, minority counsel, and Perry Apelbaum, minority chief counsel.

OPENING STATEMENT OF CHAIRMAN MOORHEAD

Mr. MOORHEAD. The subcommittee will come to order.

Today the Subcommittee on Courts and Intellectual Property is conducting a hearing on a bill introduced by my colleague from California, Mr. Bono, by myself, and by a number of members of the subcommittee. H.R. 1170 would establish, pursuant to the procedures established in 28 U.S.C. 2284, three-judge court panels in actions brought in or removed to Federal district courts which challenge the constitutionality of State laws passed by popular referenda. The bill further provides for an expedited consideration of such actions under 28 U.S.C. 2284(b)(1) and grants the right of appeal to the Supreme Court in line with 28 U.S.C. 1253.

Unlike other acts which provided for three-judge court panel consideration of constitutional challenges to State laws prior to the abolition of many such panels in 1976, H.R. 1170 is specifically limited to State laws which are voted on directly by the entire populace of a State. This legislation more closely parallels apportionment and Voting Rights Act cases which traditionally have been granted three-judge court panel consideration by Congress because of the importance of such cases and because such cases are presented so rarely they do not present the same burden on the courts as cases which involve constitutional challenges to general State laws passed by the State legislative process. A Congressional Research Service survey reveals that over the past 10 years only 10 cases in the Nation would have been eligible for review by the

three-judge court panels which would be established under H.R. 1170.

Proponents of H.R. 1170 maintain that State laws adopted by referendum or initiative, reflecting the direct will of the electorate of a State on a given issue, should be afforded greater reverence than measures passed generally by representative bodies because of their importance and their expression of the direct vote of the populace of a State. The use of a three-judge court panel is imperative to the proper balance of State/Federal relations in cases such as these where one Federal judge can otherwise impede the direct will of the people of a State because he or she disagrees with the constitutionality of the provision passed. A three-judge court panel will help to provide fairer, less politically-motivated consideration of cases.

[The bill, H.R. 1170, follows:]

I

104TH CONGRESS
1ST SESSION

H. R. 1170

To provide that cases challenging the constitutionality of measures passed by State referendum be heard by a 3-judge court.

IN THE HOUSE OF REPRESENTATIVES

MARCH 8, 1995

Mr. BONO (for himself, Mr. HYDE, Mr. MOORHEAD, Mr. SENSENBRENNER, Mr. GALLEGLY, Mr. COBLE, Mr. GEKAS, Mr. CANADY of Florida, Mr. GOODLATTE, Mr. HOKE, Mr. COX of California, Mr. MCCOLLUM, Mr. DREIER, Mr. PAXON, Mr. RIGGS, Mr. LEWIS of California, Mr. ROHRABACHER, Mr. SCHIFF, Mr. CALVERT, Mr. PACKARD, Mr. SMITH of Texas, Mr. BAKER of California, Mr. HERGER, Mr. HUNTER, Mr. DORNAN, Mr. THOMAS, Mr. HEINEMAN, Mr. CUNNINGHAM, Mr. POMBO, Mr. INGLIS of South Carolina, Mr. MCKEON, Mr. DOOLITTLE, Mr. KIM, Mr. BUYER, Mr. ROYCE, Mr. FLANAGAN, Mr. BARR, Mr. HORN, Mr. BRYANT of Tennessee, Mr. BILBRAY, Mr. CHABOT, Mr. RADANOVICH, and Mrs. SEASTRAND) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide that cases challenging the constitutionality of measures passed by State referendum be heard by a 3-judge court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. 3-JUDGE COURT IN CERTAIN ACTIONS.

(a) IN GENERAL.—Any action that is brought in or removed to a district court of the United States and that

challenges the constitutionality of a State law adopted by referendum shall be heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code, and any appeal of such action shall be to the Supreme Court. In any such action, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the court shall expedite the consideration of the action.

(b) INJUNCTIONS AGAINST ENFORCEMENT OF STATE LAW.—An interlocutory or permanent injunction restraining the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a district court or judge thereof upon the ground of the unconstitutionality of such State law unless the application for the injunction is heard and determined by a court of 3 judges convened pursuant to subsection (a). For purposes of subsection (a), the term "action" includes an application for an injunction described in this subsection.

SEC. 2. DEFINITIONS.

As used in this Act—

(1) the term "State" means each of the several States and the District of Columbia;

(2) the term "State law" means the constitution of a State, or any ordinance, rule, regulation,

or other measure of a State that has the force of law, and any amendment thereto; and

(3) the term "referendum" means the submission to popular vote of a measure passed upon or proposed by a legislative body or by popular initiative.

SEC. 3. EFFECTIVE DATE.

This Act applies to any action commenced on or after the date of the enactment of this Act.

○

Mr. MOORHEAD. I would like to yield at this time to the ranking minority member of the subcommittee, my distinguished colleague, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you very much, Mr. Chairman.

I want to begin by thanking Mitch Glazier and Tom Mooney for the great help that they've been to us in putting this hearing together.

As I think about this meeting this morning, I guess I would sum up my concern about the bill in the phrase "been there; done that," because the concept of the three-judge district court panel in cases challenging the constitutionality of State laws with a direct appeal to the Supreme Court is one that I think has been shown to have failed in the past. It was resoundingly rejected by the judiciary and the Congress in 1976, and yet, here we are again. So I hope before we rush on this act we explore our prior history.

I'd also like to say that, once again, I am sorry we're having this hearing before the Judicial Conference of the United States has an opportunity to look at this bill. They're going to be the ones living with it, and I think it's very important to hear what they have to say. As you know, they have a meeting in 2 months, and at that time would be able to give us the benefit of their views. I have strongly opposed our actions earlier this year when we did the same thing on rule 11 modifications and rule 702 of the Federal Rules of Evidence because, again, the way I read the Rules Enabling Act, we should have let the Judicial Conference respond.

This will greatly impact the workload of the Federal judiciary. So I am very pleased that we will have Judge Edwards with us today and will be anxious to hear what he has to say about that. I know we also have a letter from the Judicial Conference recounting their past positions on three-judge courts, and it is worthy to note that in the letter they state, "Since 1970, the Conference has opposed three-judge courts except for reapportionment cases." The Conference also has had strong opposition in the past to statutory provisions that mandate litigation priority because this messes up the whole court schedule and says some cases are more important than others.

I think it's also important to look at unintended consequences. You know, the law of unintended consequences raises its ugly head all the time. Right now, many of the cases that challenge the constitutionality of State laws are brought not in the Federal courts, but in the State court, and I fear that if we pass this bill, we will find that we're really forcing everything into the Federal court. And I ask, is that a good idea?

When you look to the legal challenges of proposition 187 in California, for example, there are lawsuits pending in both the State and the Federal courts, and the Los Angeles Times reports that Governor Wilson and the California attorney general have argued the State courts should be allowed to interpret proposition 187 before the Federal courts take it up. Now I don't particularly agree with that because you've got a Supreme Court decision, and I don't know why proponents of State court review would support this bill, with expedited review by a three-Federal-judge panel and an appeal to the Supreme Court, bypassing the court of appeals. I think it just is going to make everybody move the forum from State to

Federal courts because they think it's a faster track to the Supreme Court.

I'm interested, also, in exploring the premise of the bill which is that a State law enacted by ballot is somehow more worthy than a State law enacted by a State legislature. This bill says that we give preferential treatment with respect to Federal review to anything that was passed by the people directly. I don't think we have any business making that kind of judgment. That's a fairly serious judgment of which laws are allowed more gravitas in the system.

Ultimately, I think the bottom line was best stated by the UCLA professor who said, "It ought to make no difference whether it's a ballot measure, because the people have no greater authority to transgress the Constitution than their representatives in the State legislature do." I don't read anywhere in the Constitution that the people have more of an ability to rip it up than their elected representatives do.

The education component of proposition 187 has been specifically designed to spur a lawsuit to seek to overturn the 1982 Supreme Court decision, and, therefore, it's not too surprising that the injunction that was issued had to be issued, and probably would have been issued by any court pending further court review of the matter. If there's public unhappiness with the process, the fault is not with the judicial process that results in an injunction when the Supreme Court's been very clear on that point, but those who might wish to politically exploit this public frustration and emotion. I think we all have some responsibility to give some greater understanding to the process of constitutional law because it is such an important component of what we all believe in.

So I join the chairman in welcoming our witnesses and I look forward to the hearing this morning, Mr. Chairman.

Mr. MOORHEAD. Thank you.

[The prepared statement of Mrs. Schroeder follows:]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Thank you, Mr. Chairman. I want to begin by thanking you and your staff, in particular Mitch Glazier and Tom Mooney, for the cooperation afforded to us in planning today's hearing. We greatly appreciate that.

In thinking about the subject matter of today's hearing, I find that this whole issue is best summed up by that profound phrase, "been there, done that." The concept of a three-judge district court in cases challenging the constitutionality of state laws, with a direct appeal to the Supreme Court, is one that has failed the test of time. It is a concept that was resoundingly rejected by the judiciary and by the Congress in 1976, based on long experience. I hope that we will have ample opportunity this morning to explore our prior history with respect to three-judge district courts, so that we will not approve a proposal that has already proved unworkable.

I would also register my disappointment, Mr. Chairman, that we are holding this hearing before the Judicial Conference of the United States has an opportunity to take a position on this bill. It is my understanding that the Judicial Conference's Committee on Federal-State Jurisdiction is meeting in just two months, and would be able to give us the benefit of their views on this bill after that meeting. As you will recall, I strongly opposed our actions earlier this year with respect to modifications to Rule 11 of the Federal Rules of Civil Procedure, and to Rule 702 of the Federal Rules of Evidence, because we rushed those amendments through without going through the procedures of the Rules Enabling Act that would have provided us with the perspectives of the Judicial Conference and the Supreme Court as we considered those rules changes.

Today, we are considering a bill whose most obvious impact would be on the workload of the federal judiciary. I am pleased that we will be hearing from Chief Judge

Edwards this morning, but I do not think there is any reason why we must rush forward with hearings and markup of this bill without first soliciting the views of the Judicial Conference. Since that would result in no more than a two-month delay in our consideration of this bill, that short delay seems to me a small price to pay for the inclusion of the federal judiciary in our process.

We do have a letter from the Judicial Conference recounting their past positions on questions involving three judge courts, and it is worthy of note that consistently since 1970, the Conference has opposed three-judge courts except for reapportionment cases involving congressional redistricting or statewide reapportionment. The Conference also notes its strong opposition to statutory provisions imposing litigation priority. I hope we will have an opportunity to hear from the Judicial Conference on this specific bill before we move to markup.

It is a sound practice to consider the unintended consequences that may result from a contemplated action, and I think that is particularly true in this case. Right now, many cases challenging the constitutionality of state laws are brought, not in federal court, but in state court. An unintended consequence of this bill could be to make it much more likely that federal courts, and not state courts, will be the forum for these cases.

If one looks at the legal challenges to Proposition 187 in California, for example, there are lawsuits pending both in state and federal courts. The *Los Angeles Times* reports that both Governor Wilson and California Attorney General Dan Lungren have argued that state courts should be allowed to interpret Prop. 187 before federal courts take it up. I don't particularly agree with that view, but for those who do, I think you should consider the fact that a bill that requires expedited review by a three judge federal court, and a direct appeal to the Supreme Court, bypassing the Court of Appeals, will almost certainly have the consequence of making federal court a much more appealing forum than state courts in these cases, because of the faster and more direct track to the Supreme Court. The expedited federal track will also make it more likely that the federal court process will eclipse any opportunity for state court review.

I am also interested in exploring the premise of this bill, which is that a state law enacted by a ballot measure is somehow more worthy than a state law enacted by a state legislature. What this bill says is that we will give preferential treatment, with respect to federal review, to referenda and initiatives. What does that say to the significant number of states that do not have referendum and initiative? That their form of democracy is of lesser value? I don't think we have any business making that kind of judgment. Indeed, a strong argument can be made that the give and take of the legislative process, with hearings, markup, and debate, is likely to produce a better product than an initiative process in which voters can vote "yes" or "no," but have no method to refine the proposal.

Ultimately, however, the bottom line was best stated by UCLA law professor Evan Caminker, who said, "It ought to make no difference that it is a ballot measure, because the people have no greater authority to transgress the Constitution than does the state Legislature." I can't help but think that the impetus for this measure comes, in large part, from the frustration that many Californians reportedly feel with the federal court injunction that has been issued with respect to Prop. 187. If this is true, it is worth noting that an injunction has been issued by a state court judge, with respect to parts of Prop. 187, as well as by a federal court judge.

The education component of Prop. 187 was specifically designed to spur a lawsuit to seek to overturn the 1982 Supreme Court decision in *Plyler* v. *Doe*. Therefore, it should not be particularly surprising to anyone that an injunction has issued pending further court review of the matter. If there is public unhappiness with that process, the fault is not with a judicial process that results in an injunction when there is clear Supreme Court law on point, but rather with those who would politically exploit that public frustration, instead of furthering greater public understanding of the process of constitutional law.

I join the Chairman in welcoming our witnesses today, and look forward to hearing your views.

Mr. MOORHEAD. I recognize at this time the gentleman from California, Mr. Bono.

Mr. BONO. Thank you, Mr. Chairman, and I want to thank all my cosponsors.

I would like to just submit my written testimony and briefly talk about why I thought this bill was appropriate.

The bill was introduced, Mr. Chairman, basically, because 5 million people voted for a measure and one hand-picked Federal judge has decided that he will not hear the case until almost a year later. Simply speaking, not being a lawyer and coming from a point of just common-sense observation, it appears to me that we have referendums in California so that the people do have a voice. When the politicians don't represent their voice, they, themselves, can initiate a proposition, and if it has the approval of the majority of the people, it passes. And by that process, it seems to indicate it is the desire of the public to implement this law, even if it is overlooked by the legislature, which is a fine system.

However, I think there's a loophole in the system, and the loophole is simply that when a referendum is passed, especially one by a very large number, that the opposition to that referendum can simply at the time of its passage take it and shop a judge until they find a judge that is sympathetic to their position, and that judge can then use legal maneuvers to sit and sort of bury that proposition, and it just sits there and then goes through an endless process that never brings about the will of the people.

Again, I think it's a loophole. And when I saw that acted out on proposition 187, I thought it was sad that everybody put such a tremendous effort and so many dollars, and then it just ended at that point. So I was dedicated to try to do something about that. To the degree that I could, I got as much legal information as I possibly could, and this seemed—this appeared to me, Mr. Chairman, that it is perfectly logical to proceed in this manner.

About clogging the courts, this will not—this bill would not clog the courts. The Library of Congress said it would only have been put in place 10 times in the last decade nationwide. It will not expand jurisdiction of three-judge courts. Since 1976, they have been used for voting rights cases. This is a voting rights case. It will not alter the final outcome. In fact, it makes it more objective, which is what the courts are for and what the point is. If the bill is unconstitutional, it will still be ruled that way. It will not affect proposition 187.

I'm more than willing to make perfection changes, such as clarifying the bill applies to the constitutionality of the law itself, not how the law is applied.

Thank you very much, Mr. Chairman.

Mr. MOORHEAD. Thank you.

[The prepared statement of Mr. Bono follows:]

PREPARED STATEMENT OF HON. SONNY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I first want to express my sincere appreciation to you for calling this hearing. With the schedule of this Committee, I never dreamed I would get a hearing on a bill before the Easter district work period.

In addition, I want to thank you and the majority of this subcommittee for cosponsoring this bill. It certainly shows overwhelming support for this common-sense idea.

H.R. 1170 was introduced to give a certain amount of dignity back to the democratic process. In California, Five Million people recently supported a ballot initiative, by almost a 3-to-2 margin. Yet the will of the people is not being heard because one Federal judge has stopped the process, in fact, it will be September until he even hears the case.

I believe it is undemocratic for one person to hold the will of the people at bay for an entire year.

Since the bill has already been explained, let me take a few moments to say what the bill will not do.

This bill will not clog the courts. According to the Library of Congress, if this bill had been law, it only would have been invoked ten times in the last decade. That averages once a year nationwide.

This bill also does not open up three-judge panels to new types of cases. Since 1976, three-judge panels have been primarily reserved for issues of voting rights. This is an issue of voting rights.

Finally, this bill will not alter the outcome of the case. This bill re-establishes the courts objectivity. Currently, opponents blatantly "forum shop" for a judge to their liking. This is an abuse of the system. If a law is unconstitutional, it will still be ruled unconstitutional .

I look forward to hearing the testimony of the witnesses, and am willing to make perfecting changes that may be recommended. For example, making it more clear that the bill applies to the constitutionality of a specific law, not of the law as applied.

Several people will be entering statements of support into the record, including former Attorneys General William Barr and Ed Meese. and California Attorney General Daniel Lungren.

To conclude, this bill has unfortunately been caught up in the concern about Proposition 187, which it will not affect. However, it is simply a matter of fairness. I ask my colleagues on the other side to imagine their frustration should a conservative group frustrate the will of the people on a liberal cause.

Again, thank you Mr. Chairman.

Mr. MOORHEAD. At this time I would recognize the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. And I'd like to thank you for holding these hearings on what I think is a very good bill. I'd like to thank Congressman Bono for offering it, and I'm pleased to be a cosponsor of it.

You know, we're talking about something that is fairly unusual. It's not something that is going to abuse the judicial process of this country in any way, shape, or form. The Congressional Research Service took a survey recently that reveals that in the past 10 years only 10 cases in the Nation would have been eligible for review by a three-judge court under H.R. 1170, the gentleman from California's bill.

And I think when we're talking about a situation where millions of citizens have, through a very special and very arduous process, that of initiative and referendum, gone through that process and expressed the will of the people, and then to have a situation where one judge can arbitrarily delay consideration of that for an inordinate length of time, either by the ability of opponents to the initiative and referendum to forum shop for a particular judge or through the luck of the draw get a judge who doesn't agree with the constitutionality of a particular measure—I think it is entirely appropriate that we look for a more suitable alternative, and a three-judge panel and the method by which they are selected in this process, I think is a good one.

So I look forward to the testimony of the witnesses, and hope that we can do something here to help these particular special situations that are far different than the normal process through which legislation is enacted through a State legislature and involved far more effort, and to have all of that effort delayed or overturned on the basis of one individual decision is to me inappropriate, and we should look for a good change.

Thank you, Mr. Chairman.

Mr. MOORHEAD. I recognize the gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair.

I simply want to make one observation, that in our experience over the years the use of a three-judge panel in Federal jurisdictions is commonplace; that is, on many different kinds of issues the three-judge panel grows naturally out of the process and is determinant of many of the issues that have vexed our society in various ways. So it will not be an unusual step for us to extend that three-judge panel concept to this very important referendum issue. In fact, the three-judge panel I think has been a creation of the Judicial Conference in many different special cases where they feel that they need an immediate type of resolution to a particular problem. So the three-judge panel becomes almost a routine matter in many different kinds of cases. So, with that background, I believe we have an opportunity to listen to the testimony knowing that the three-judge panel is not a strange animal.

I thank the Chair and yield back the balance of my time.

Mr. MOORHEAD. The gentleman's time has elapsed. I recognize at this time the gentleman from Ohio, Mr. Hoke.

Mr. HOKE. Thank you very much, Mr. Chairman. And I want to thank you for bringing this hearing up so quickly, and I want to thank Mr. Bono for bringing the bill up and writing it.

I'm sorry that he, on behalf of his constituents and also the State of California, has to do this in reaction to a less-than-good result for his constituents in that State with respect to proposition 187, but I am grateful that we will have the opportunity here, through the Congress, to require that three-judge panels will review statewide referendums when they are challenged in the future, should the Congress pass this law, because what that does mean is that the people of the State of Ohio will not have to go through the disappointment and unfortunate experience that the residents of California have had to go through with respect to proposition 187.

And I'm not speaking, frankly, on the merits of the case, but what I am saying is that it is obvious that there was a great deal of forum shopping that was undertaken in that particular instance, and that is not what we would want from the Federal court system under any circumstances, where a State has undertaken, through the voice of the people collectively, pursuant to an election and pursuant to a referendum and pursuant to a tremendous amount of debate, comment, thought, and reflection with respect to a specific issue, to speak on that issue in the most direct way, in the most sacred way that the people of any State in this entire Union are able to do that, and that is by popular referendum. It is a unique mechanism that we have in this country to make our will known as the people. And for them to have that specific judgment by the people shopped in a way that, frankly, is a tacky way to use the Federal court system—we can put a stop to that today. We can change that procedure. And I am really very grateful to Mr. Bono that we will have that opportunity, and we'll have a broader kind of consideration of this in the future.

Thank you, Mr. Chairman.

Mr. MOORHEAD. The gentleman from Florida, Mr. Canady, is recognized.

Mr. CANADY. Thank you, Mr. Chairman.

I just want to thank you for holding this hearing, and I look forward to the testimony of the witnesses.

Mr. MOORHEAD. I'm introducing into the record the statement of the Judicial Conference of the United States and the statement of the office of the attorney general, Dan Lungren, dated April 4, 1995, into the record.

[The prepared statement of Mr. Mecham follows:]

PREPARED STATEMENT OF L. RALPH MECHAM, SECRETARY, JUDICIAL CONFERENCE OF THE UNITED STATES

Dear Mr. Chairman, thank you for your letter of March 24, 1995, requesting comments on H.R. 1170, a bill to provide that cases challenging the constitutionality of measures passed by state referendum, as well as interlocutory or permanent injunctions sought to restrain the enforcement, operation, or execution of such laws, be heard by a three judge court, in accordance with the procedures in section 2284 of title 28, United States Code. The bill also requires expedited consideration of the case by the three judge court and provides for direct appeal of these cases to the Supreme Court.

The Judicial Conference has not taken a position on H.R. 1170. In the past, the Conference has commented upon the appropriateness of retaining three judge courts for certain classes of cases. Ultimately, it remains for Congress to determine what types of cases should be determined by how many judges. Below, however, is a summary of positions the Conference has taken on this issue.

In October 1970 the Judicial Conference endorsed the repeal of sections 2281 and 2282 of title 28, United States Code, which required a three judge district court in cases seeking to restrain the enforcement, operation, or execution of all state or federal statutes for repugnance to the Constitution and to provide for direct appeal to the Supreme Court in certain cases.[1] The Conference explained that much of the concern by state officials had lessened regarding the granting of injunctions against enforcement of state statutes by a single federal judge, which was why such courts were first created in 1910. Also, the requirement for a three judge court in such injunction cases, it was noted, created a judicial burden for district and appellate judges because of the volume of cases necessitating a three-judge panel and the resulting limitations on the judges' availability to handle other cases.

The Conference further explained in 1970 that the mechanism allowing for direct appeal to the Supreme Court avoided the screening process of appellate review at the court of appeals level, which better serves the interests of justice. The repealing legislation which the Conference was then endorsing would have instead created a new section in title 28 providing for the direct review of any preliminary or permanent injunction granted against enforcement of a state or federal statute for repugnance to the Constitution by the appropriate court of appeals or by the Supreme Court at the election of the attorney general of a state or the Attorney General of the United States, depending on the statute involved in the suit—in essence, the cases subject to sections 2281 and 2282.

I note that the 1970 position addressed a statute applying to constitutional challenges to all state laws, whereas the amendment in H.R. 1170 appears to apply only to state laws adopted by referendum. Subsequently, the Conference endorsed the retention of three-judge courts for reapportionment cases involving congressional redistricting or statewide reapportionment.

At its October 1971 session, the Judicial Conference commented upon a bill implementing recommendations of the American Law Institute to curtail the use of three-judge courts. The Conference reaffirmed its support for the elimination of three-judge district courts in those cases seeking to restrain the enforcement of state or federal statutes that have been challenged on constitutional grounds and to provide for direct appeal to the Supreme Court in certain cases, as proposed in 1970. One year later, the Conference approved a bill to amend the requirement for a three judge court, although the bill was different from the 1970 recommendation in that it did not give the attorney general of a state or the Attorney General of the United States the option of appealing to the appropriate court of appeals or directly to the Supreme Court.

In March 1983 the Judicial Conference considered the Judicial Reform Act of 1982 and a provision therein to require that an injunction directed against a state or any

[1] Sections 2281 and 2282 of title 28, United States Code, were both repealed in 1976.

officer, commission, political subdivision, or other agency of a state be heard by a three-judge district court. The Conference repeated its support for the elimination of three-judge district courts, as articulated by it in 1970.

Concerning expedited review, the Judicial Conference in September 1990 reiterated its strong opposition to statutory provisions imposing litigation priority, expediting, or time limitation rules on specified classes of civil cases brought in federal courts beyond those specified in 28 U.S.C. § 1657. This position was taken in response to legislative efforts to impose litigation priorities and time limits in certain classes of cases.

I hope that this information is helpful and, as you know, we stand ready to assist you in any way we can. Please let me know if you have any questions, or you may wish to call Mike Blommer, Assistant Director for the Office of Congressional, External and Public Affairs, at 273–1120.

[The prepared statement of Mr. Lungren follows:]

PREPARED STATEMENT OF DANIEL E. LUNGREN, ATTORNEY GENERAL, STATE OF CALIFORNIA

Dear Congressman Moorhead, at the request of Chairman Henry J. Hyde, I offer the following comments for the record on H.R. 1170, which is before the Subcommittee on Courts and Intellectual Property in its hearing on April 5, 1995.

Chief Justice William H. Rehnquist, while an Associate Justice and Circuit Justice for the Ninth Circuit, once observed that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.* (Opinion of Rehnquist, J., in Chambers), 434 U.S. 1345 (1977). The year before the Chief Justice expressed this thought, Congress had acted to repeal statutory protection against just such irreparable injury that had been wisely enacted by a prior Congress sixty-six years before. H.R. 1170 provides an opportunity to restore the protection of the states against untoward federal judicial interference with implementation of the will of the states' electorate, when expressed directly at the ballot box through the processes of the initiative and referendum.

H.R. 1170 is a measured response to a major problem. It does not eliminate the power of federal courts to review the constitutionality of state laws. Nor does it prohibit injunctions against the enforcement of unconstitutional state statutes. What it does is recognize that to maintain the fundamental constitutional balance between the federal government and the states, these provisions must not rise or fall at the whim of a single federal judge.

The inherent threat to the balance, so critical to our federal form of government, that is raised by federal judicial intervention in the execution of state laws, has been recognized since the beginning of our nation. As early as 1793, Congress provided that no federal injunctions should be granted to stay state court proceedings. Although statutory exceptions have been en grafted on this provision, it is still the general policy of Congress, based on wise principles of federalism, that state courts shall remain free from interference by federal courts. *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970).

The fundamental principle of the Eleventh Amendment to the Constitution is that state sovereign immunity limits the grant of jurisdiction to federal courts. The States occupy a special and specific position in our constitutional system. As Justice Powell stated in his dissenting opinion in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 4 69 U.S. 528 (1985), "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Id.,* at 572 (Powell, J. dissenting). And the Supreme Court has subsequently affirmed that "[b]y guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. . . ." *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985).

In 1908, the Supreme Court decided in *Ex parte Young,* 209 U.S. 123 (1908) that notwithstanding the prohibitions of the Eleventh Amendment, injunctions could issue against state officers to prevent them from enforcing unconstitutional statutes. The decision sent a shock wave through the federal system. Its effect was, in Justice Harlan's words, "to enable the subordinate federal courts to supervise and control the official actions of the States as if they were 'dependencies' or provinces." *Ex parte Young,* 209 U.S. at 175 (Harlan, J., dissenting). By 1910, Senator Overman of North Carolina could say, "there are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney general . . . Whenever [that happens], . . . public sentiment is stirred, . . . and you

find the people of the State rising up in rebellion." 45 Cong. Rec. 7256 (1910), quoted in Hart & Wechsler, *The Federal Courts and the Federal System,* p.1334 (3rd ed. 1988).

Congress acted immediately to increase the level of scrutiny given cases in which injunctions were sought against enforcement of state statutes. Legislation like H.R. 1170, but applicable to all state laws, was enacted to require that in every case in which injunctive relief was sought against the enforcement of state statutes on constitutional grounds, a three-judge court must be convened, with a direct appeal to the Supreme Court. 36 Stat. 557. This was the predecessor of 28 U.S.C. 2281. The statutory protection was subsequently extended to interlocutory injunctions against state administrative orders, and eventually, to cover permanent injunctions as well. Hart & Wechsler, supra, at p. 1334. It remained in effect until 1976, when Congress abolished it in apparent response to workload burdens on the courts. *Ibid.*

But judicial workload simply does not justify giving individual judges the power to suspend state laws indefinitely when they find them offensive. Put very simply, in the absence of statutory safeguards on judicial process, any duly-enacted state law may be enjoined on grounds of constitutionality without a full hearing on the merits. Furthermore, in the absence of a stay on appeal, judicial review of a particular judge's order may take years to complete. The states, sovereigns within the federal system, deserve better.

In the Federalist Papers, Alexander Hamilton recognized the danger that "the courts, on the pretense of a repugnancy, may substitute their own pleasure [for] the constitutional intentions of the legislature. . . ." *Federalist No. 78.* Or, as Justice Frankfurter said, "As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements." *A.F.L.* v. *American Sash Co.,* 335 U.S. 538, 556 (1949) (concurring opinion). The Founding Fathers wisely adopted the separation of powers doctrine to prevent the abuses of judicial review. They rejected the proposed "Council of Revision," on which judges would sit in review of proposed legislation. See Berger, *Government by Judiciary,* pp. 300–304 (1977). And Congress in its earliest days spoke out against the principle of a single judge issuing injunctions having the effect of interfering with state judicial proceedings.

The reasons for requiring restraint, deference, and caution in reviewing state laws has been characterized by our Supreme Court as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

The Court in *Younger* went on to state:

> The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both those courses. What the concept does mean is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should not be forgotten that this slogan, "Our Federalism," born in the early days of our Union of States, occupies a highly important place in our Nation's history and its future. *Younger* v. *Harris,* 401 U.S. 37, 44–45 1971).

I support H.R. 1170 and believe that its rationale applies to duly enacted statutes as well as initiative measures. It recognizes the role of the states as laboratories within our federal system, their status as sovereigns, and the principle that their governmental processes must not be stopped in their tracks indefinitely on the basis of the limited hearings necessarily given to applications for ex parte or interlocutory relief made to a one-judge court.

Over 90 years ago, Justice Holmes wrote: Great constitutional provisions must be administered with caution . . . . it must be remembered that legislators are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. *Missouri K. & T. Ry.* v. *May,* 194 U.S. 267, 270 (1904). Those wise words apply with equal vitality, if not with even greater strength, to the initiative and referendum process which is the subject of H.R. 1170. This measure deserves your favorable consideration.

Mr. MOORHEAD. Our first witness this morning will be Prof. Harold G. Maier, who holds the David Daniels Allen Distinguished Chair of Law at Vanderbilt University in Nashville, TN. Professor Maier is serving currently as the Visiting Woodruff Professor of International Law at the University of Georgia. Professor Maier has testified numerous times before Congress on issues of federalism, Federal/State relations, and international law. He has served on the Committee of Consultants of the Complex Litigation Project of the American Law Institute, and was chairman of the Section on Conflict of Laws for the Association of American Law Schools. He has lectured and written extensively in the areas of constitutional law, conflicts, preemption of State laws, civil procedure, and Federal courts, and served as a guest scholar at the Brookings Institution.

Welcome, Professor Maier.

Our second witness, who is supposed to arrive about 10:30, will be Chief Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit. Chief Edwards, as I say, will be joining us about 10:30 and has graciously agreed to come and answer questions from the panel today on his procedural and administrative experience in dealing with and establishing three-judge panels in his role as Chief Judge and as a participant on such panels. Chief Judge Edwards is currently serving on a three-judge panel in a voting rights case.

Chief Judge Edwards will not be submitting written testimony, and the panel thanks him in advance for answering its questions on three-judge panel procedures.

Our third witness is Prof. Burt Neuborne of the New York University School of Law. Professor Neuborne was the national legal director of the American Civil Liberties Union from 1982 to 1986 and assistant legal director from 1972 to 1974. The ACLU has brought many cases in Federal court challenging the constitutionality of State statutes, and Professor Neuborne has been for the past 20 years one of the Nation's most active civil liberties lawyers. Professor Neuborne has written extensively in the area of political and civil rights in the United States.

Welcome, gentlemen.

We have written statements of Professors Maier and Neuborne, and I ask unanimous consent that they be made a part of the record, and ask you both to summarize your statements in approximately 10 minutes.

I ask the subcommittee to hold their questions for all three witnesses until the professors have completed their oral presentations. When Judge Edwards arrives, we will turn to him for answers on questions on the three-judge procedure, so that he may return and attend to his pending cases.

We will begin with the testimony of Professor Maier. Will you both come forward?

STATEMENT OF HAROLD G. MAIER, PROFESSOR OF LAW, DAVID DANIELS ALLEN DISTINGUISHED CHAIR IN LAW, VANDERBILT UNIVERSITY SCHOOL OF LAW

Mr. MAIER. Thank you very much, Mr. Chairman. It's a pleasure to be here, and I appreciate being asked to express my views on this legislation before this subcommittee.

I think it would be helpful if I started by saying what I think the hearing is not about. That doesn't mean that we can't talk about anything that interests the committee but, in my view, this is very narrow legislation with which we're concerned.

First, the issue deals with a very particular kind of legislation, the referendum and initiative process. That process of initiative and referendum is, I think, the ultimate application of the one-person, one-vote principle that the Supreme Court of the United States has endorsed with respect to congressional district apportionment and other matters. It is, therefore, appropriate, I think, that the committee and the Congress consider this particular legislation, which is, an addition to United States Code, section 2284, in this context. Section 2284 provides for three-judge panels with respect to apportionment cases and, with respect to other areas in which Congress has required that such panels be created. Each of those areas deals in one form or another, with voting rights or protecting the effect of voting by the electorate. Therefore, if we're going to talk about requiring a three-judge panel to review the constitutionality of referenda and initiatives, section 2284 is an appropriate context in which to do it.

The reason I view the proposed legislation as being relatively narrow is because, as I understand it, the question before the subcommittee is not whether section 2284 should be repealed. That certainly is an issue that Congress could address, if it wished, but as currently written, section 2284 already expresses the will of the Congress that in some situations a three-judge panel is appropriate.

So although I'd be happy to address any questions raised with respect to the general issue of whether three-judge panels make sense, with respect to H.R. 1170 it seems to me that the question is whether this addition to those areas already dealt with under section 2284 is an appropriate one.

H.R. 1170 is a relatively narrow addition to U.S.C. 2284 because of two parts of the legislation which I'd like to address separately. The first is section 1(a) of section 1170. I think Congressman Bono has already referred to this in his opening remarks. That section provides, in effect, that any action that is brought in any State court to test the constitutionality of a State law adopted by referendum, which includes laws adopted by initiative, would have to be heard by a three-judge Federal panel. In the paper I submitted to the subcommittee, I raised some questions about that provision because it covers two different kinds of constitutional challenge by its terms. These two different kinds of constitutional challenge overlap.

One type is a challenge to the validity of a state statute "as applied." I won't repeat the illustration that I included in the paper that I've given you. Generally, challenging a statute as applied means urging that the specific facts of a particular situation indi-

cate that the application of the statute in that case produces an unconstitutional result with respect to the specific persons or group of persons in that case.

The statute might, however, be constitutional as applied to someone else in a different situation.

The broad language of H.R. 1170, section 1(a), would require a three-judge panel hearing in cases of that kind. As I indicated in my written submission, I think that the utility and wisdom of that approach is problematic. For one thing, the courts are normally not dealing with a general injunction to prohibit the enforcement of the State statute in cases of that kind. The court might be dealing with an injunction to prohibit the application of a particular statute to a particular individual. It might be alleged that irreparable harm would occur to that person if that statute were applied—for example, if the party were, prevented from practicing medicine, as in the illustration I gave. Such a case would involve proving facts with respect to the particular individual's status under the statute. I think that the committee ought to consider whether it wishes section 1(a) of 1170 to be quite as all-encompassing as it currently appears to be.

Section 1(b) is different. It is a relatively narrow and appropriate addition to the congressional legislation already incorporated by reference into section 2284 requiring hearings before three-judge panels.

I find section 1(b) to be relatively narrow because it applies only to situations in which the State statute's validity or enforceability—and, therefore, the utility of a temporary or a permanent injunction—is in question because of the statute's general unconstitutionality. Section 1(b) does not address the question of the issuance of injunctions or temporary restraining orders with respect to a statute which is allegedly in conflict with Federal legislation, as distinguished from a statute that is allegedly unconstitutional.

As currently written, H.R. 1170 provides, in pertinent part, "An interlocutory or permanent injunction restraining enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a district court or judge upon the ground of the unconstitutionality of such State law, unless the application for an injunction is heard and determined by a court of three judges," et cetera.

The legislation, as currently drafted, would not prohibit the issuance of an injunction by a single judge against the application or enforcement of a State law on grounds that the State law conflicted with an existing and otherwise constitutionally valid Federal statute. Whether the committee wishes to expand the application of section 1(b) to include conflicts with Federal statutes is, of course, a question that it might address in the future, but that's not in the legislation that is before the committee today.

I think that H.R. 1170 appears to be a useful compromise. Compromise is inherent in the legislative process generally. Setting aside common political rhetoric, the art of legislating, I think, does not principally involve making choices between good and evil. Rather, legislating requires a choice about distributing the limited resources of a nation among the many worthwhile causes and activities that Government might support or encourage. The question al-

ways is, "To which of these worthwhile activities should the Government devote how many of these limited resources?"

On balance, it seems to me that the question that's before the subcommittee and, ultimately, before the committee and the Congress, is whether the benefits that might arise from the adoption of H.R. 1170, particularly section 1(b), can be achieved with the commitment of a relatively limited amount of additional resources without resurrecting the difficulties which, in fact, were present under the more generalized provisions for use of a three-judge Federal panel prior to 1976?

In that context, let me just say a word about why I believe that section 1(b) of H.R. 1170 is an appropriate and relatively limited addition to U.S.C., section 2284. Generally, actions seeking to enjoin the general application of a State statute test the constitutionality of the statute on its face, not its constitutionality as applied to a particular individual or under specific circumstances. I do not mean that factual considerations are not relevant to the court in such cases. I do suggest that to find a statute unconstitutional on its face, the court must determine whether the presumed legislative facts that trigger its application would, if found, necessarily make the statute unconstitutional whenever applied in that context. My light is on. I'll conclude at this point.

There are some other elements with respect to 1170(a) that I can address, but I expect that they will be raised in questions from the subcommittee. I thank you for your attention.

[The prepared statement of Mr. Maier follows:]

PREPARED STATEMENT OF HAROLD G. MAIER, PROFESSOR OF LAW, DAVID DANIELS ALLEN DISTINGUISHED CHAIR IN LAW, VANDERBILT UNIVERSITY SCHOOL OF LAW

INTRODUCTION

The subcommittee has invited me to submit comments on H.R. 1170, entitled "A Bill to provide that cases challenging the constitutionality of measures passed by State referendum be heard by a 3-judge court." I am happy to do so.

H.R. 1170 is linked directly to U.S.C. Sec. 2284. That federal code section requires the use of a three judge federal tribunal:

> (a) when an action is filed challenging the constitutionality of the apportionment of congressional districts or of statewide legislative bodies or,
> (b) when otherwise required by Act of Congress.

Like the apportionment cases, almost all of the legislation that has incorporated provisions for submission of constitutional or other challenges to a three-judge panel is designed to protect or facilitate the rights of citizens to exercise the voting franchise.[1] Section 2284 was designed to prevent the improvident invalidation of state legislation by a single judge.[2] H.R. 1170 is similar in that it seeks to require early and reliable constitutional review under the uniform procedures established in U.S.C. Sec. 2284 of legislation passed by direct vote of a state's citizenry.[3]

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[1] Other such legislation includes 42 U.S.C. Sec. 1971, concerning civil actions by the United States government to prevent a pattern or practice of discrimination in voting rights, 42 U.S.C. Sec. 1973b, 42 U.S.C. Sec. 1973(b) and (c), concerning declaratory judgment actions by a State or its political subdivisions to determine the validity of its tests for eligibility to vote or its voting qualifications and procedures, 42 U.S.C. 1973 (b) and (c), concerning actions by the United States to seek injunctive relief to enforce the Twenty-Sixth amendment to enjoin a state or political subdivision from denying the right of eighteen-year-olds to vote, and 26 U.S.C. Secs. 9010 and 9011, providing declaratory and injunctive relief and judicial review with respect to uses of Presidential election campaign funds.

[2] *Phillips* v. *United States*, 312 U.S. 246, 250–51 (1941).

[3] In some sense, the referral of a proposal to the entire body politic of a state for referendum has real parallels to a decision to reapportion a state legislature by drawing new district lines. With respect to the referendum, the state has, in effect, been "reapportioned" into a single vot-

H.R. 1170, Section 1(a), Is Too Broad

Section 1 of H.R. 1170 has two principal provisions that suggest two different effects of the bill. Section 1(a) appears to be all-encompassing. It provides, in paraphrase, that any action in a U. S. District Court challenging the constitutionality of a law passed by state referendum must be heard by a three-judge federal panel. Section 1(a) does not distinguish between actions challenging the constitutionality of a state law as applied from actions arguing that a state statute is unconstitutional on its face. This provision, in effect, substitutes a three-judge panel for the federal district judge or for a federal jury, in the event that a plaintiff claiming injury from the unconstitutional application of a state statute asks for a jury trial. An illustration of such a case may be helpful.

Suppose, for example, that state A adopts, by initiative or referendum, a statute requiring that doctors may be licensed to practice only if they possess "the good character and general fitness requisite for a doctor in medical practice," such qualifications to be determined by a State Review Board. Plaintiff, a United States citizen of Hispanic ethnic origin, files suit in a federal court, claiming violation of the federal civil rights laws and the United States Constitution because the State Review Board found that he was unfit to practice medicine in State A because he did not speak "standard" English; that is, he spoke with a pronounced Spanish accent. Plaintiff argues the he was discriminated against because of his ethnic origin, not because of his linguistic ability. State A answers that it applied the statutory requirement properly without regard to the plaintiff's ethnic origin. Its decision, it says, was based solely on the plaintiff's poor linguistic ability in English. Almost no one in State A speaks Spanish fluently. Therefore, plaintiff was not "generally fit" for the practice of medicine. In such a case, the plaintiff would be challenging the constitutionality of the statute as applied to him, not the constitutionality of the requirement that a doctor be generally fit to practice.

Such a case would necessarily require proof of a multitude of facts specifically related to the particular plaintiff, e.g., about his fitness as a doctor, his prior training, the state's past interpretations and applications of the statute, whether there was evidence of ethnic or racial prejudice on the part of the Review Board, or whether plaintiff's limited linguistic ability in English was the principal reason for the Board's refusal to certify him, etc. Under H.R. 1170, Sec. 1(a), this case would have to be heard by a three-judge federal panel instead of a federal trial judge or a federal jury because it is a case ". . . that challenges the constitutionality of a State law adopted by referendum. . . ."

Whether requiring the use of a three-judge panel would produce more effective adjudications in cases challenging the constitutionality of a state statute as applied in particular circumstances is problematic. Furthermore, there appears to be no particular reason why a three-judge federal tribunal would be preferable to a single federal district court judge in such a case since, at the trial level, most issues would turn on case-specific findings of fact as well as case-specific conclusions of law. Lastly, using three judges to conduct a trial proceeding in which the issue and result in the case are necessarily fact-specific appears to be unduly cumbersome, if not entirely unworkable; e.g., Would the three-judge panel appoint one of its number to rule on admissibility of evidence; or would the judges confer and vote in each instance on objections based on grounds of relevance, hearsay, etc.?

Although appellate deference to findings of fact by a trial judge is strong, the broad policy issues that are the core of a case involving a determination of whether a statute is unconstitutional on its face are generally missing in a case like that in the hypothetical. Usually, an injunction against general enforcement will not issue. Thus, a district judge's social, psychological or political predispositions toward one side of a case rather than another might influence the outcome of such a case but would usually have little or no effect on the constitutionality of the statute with respect to other cases where its application did not raise similar fact-specific constitutional questions. Under existing law, a federal court of appeals could ultimately hear appeals on all questions of law raised at trial as well as on the sufficiency of the evidence in a case challenging the constitutionality of a state statute as applied. Thus, the added burden on the judiciary of requiring a three-judge panel to determine both facts and law as a court of first instance in a case challenging the constitutionality of a state statute "as applied" to a particular person or group does not seem justified by any relevant policy.

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ing district to vote directly on legislation, the purest possible implementation of the one person one vote principle. See text at note 8.

H.R. 1170, Section 1(b), Is a Useful Compromise

Section (l)(b) of H.R. 1170 is a different matter. That section of the bill requires a three-judge federal panel to hear actions seeking an interlocutory or permanent injunction to prevent enforcement of a state statute, passed either by initiative or referendum.[4] Almost by definition, actions asserting the unconstitutionality of a state statute and seeking injunctions against applying it are filed before that statute is actually enforced by state authorities. Therefore, such actions generally challenge the constitutionality of the statute on its face. It is precisely such actions that have been brought in both state and federal courts in California to prevent that State from instituting any proceedings under so-called Proposition 187 dealing with the rights of aliens, the statute that stimulated the introduction of H.R. 1170.

Normally, actions seeking to enjoin the application of a statute by state authorities on grounds that it is unconstitutional on its face call for conclusions of law about the validity of the statute under the state or federal constitutions, not for review of findings of fact in a trial court. Facts demonstrating the unconstitutional effect of a state statute are, of course, relevant. But these tend to be general "social" facts, most easily presented to the court by affidavit or expert testimony, in a form similar to the so-called "Brandeis Brief," not facts about the effect of the statute upon a particular plaintiff. The effect of H.R. 1170 is to begin such an action with a court in the nature of an "appellate panel,"[5] a highly appropriate approach when the principal issues to be decided are issues of law, rather than case-specific issues of fact.

Thus, H.R. 1170, in effect, skips the "trial" stage in cases in which case-specific questions of fact are normally not at issue, and goes directly to a three-judge panel to determine relevant questions of law. In that context, the three-judge panel plays a functional role more like that of an appellate court reviewing a case submitted to a district court on an agreed statement of facts but operating without the benefit of initial conclusions of law by the court of first instance. The three-judge panel would decide the case in the light of relevant constitutional language and of existing case law interpreting that language with reference to the legislative facts that the statute presumes.

The procedures embodied in H.R. 1170 and U.S.C. Sec. 2284 make sense for cases challenging the constitutionality of a statute on its face for three reasons. First, H.R. 1170, like other federal legislation containing provisions for a three-judge panel,[6] is designed to protect voters in the exercise of their franchise or to protect the results of that exercise. It does so by assuring that the policy biases of a single federal judge or of a particular judicial district will neither place a judicial imprimatur on a statute of doubtful constitutionality nor stall the application of otherwise effective legislation that reflects the will of the people expressed by direct referendum.[7] The proposal lends public credibility to a constitutional decision, pro or con, because a decision under this procedure would require the concurrence of at least two members of a three judge federal court.

Secondly, the purpose of H.R. 1170 parallels similar general policies embodied in other federal legislation requiring three judge review. For example, U.S.C. Sec. 2284 requires a three judge panel in apportionment cases to assure that the one-person, one-vote principle,[8] a principle designed to create as direct a link as possible between the will of the people and the acts of the legislature, will be properly applied.[9] Likewise, various federal statutes dealing with other aspects of voting rights[10] (incorporated by reference into U.S.C. Sec. 2284) require a three judge panel to assure that the exercise or effectiveness of the franchise is not inhibited by the natural biases of any single federal judge.

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[4] An initiative is a measure proposed directly by the people, usually engineered by a committee of citizens, and placed on the ballot without the benefit of legislative discussion and formulation. A referendum is a measure, prepared by the legislature or one of its committees and submitted to the people rather than to the legislative body for final adoption.

[5] The three-judge district court, of course, remains technically a district court in terms of its jurisdiction, procedures and place in the judicial hierarchy. *Phillips* v. *U.S.*, 312 U.S. 246. 248–51 (1941); *Jacobs* v. *Tawes,* 250 F. 2d 611, 614 (4th Cir. 1957).

[6] See note 1.

[7] See *Phillips* v. *United States,* 312 U.S. 246, 250–51 (1941); *Jacobs* v. *Tawes,* 250 F. 2d 611, 614 (4th Cir. 1957).

[8] *Baker* v. *Carr,* 369 U.S. 186 (1962).

[9] Justice Clark explicitly recognized the similarity between state initiative and referendum laws and the protection provided to the people by the constitutional prohibition of unfair apportionment of voters among legislative districts. *Baker* v. *Carr,* 369 U.S. 251, 259 (1962 (Clark, J. concurring).

[10] See list in note 1.

Thirdly, H.R. 1170 will substantially limit the practice of shopping around for a federal judge or a particular venue likely to be sympathetic to the plaintiff's cause. The recognition that individual judicial policy predilections may influence a judge's decision whether to grant an injunction leads attorneys to "shop" for the federal district within a state most likely to have a predisposition in favor of that attorney's argument in behalf of his or her client. Such forum shopping is good law practice; but it is also a practice that, at least with respect to legislation passed by referendum or initiative, does not necessarily result in the most effective decisionmaking or inspire the greatest public confidence. It subjects the directly expressed will of the people to the vagaries of a single judge's policy predispositions selected, in advance, by the conscious forum selection of a competent lawyer.

The statutes already enacted that, like H.R. 1170, require the use of three-judge panels, are not attacks on the integrity of the federal judiciary. Rather, they reflect the recognition of the obvious truth that no matter how objective any human being may attempt to be, that individual's prejudices and predilections will subtly, if not overtly, influence his or her decisions, especially when addressing matters of high constitutional policy.[11]

The constitutional issues raised in cases of this kind are often complicated and difficult and, therefore, more appropriately addressed by a proceeding in the nature of an appellate hearing than by a single trial judge. Illustrative are the questions raised by California's Proposition 187, injunctions against the enforcement of which in part encouraged the introduction of H.R. 1170.[12]

Proposition 187—A Case Study

The stated purpose of Proposition 187 is to protect the people of California against the hardships caused by the presence of illegal aliens by preventing such aliens "from receiving benefits and or public services in the state. . . ."[13] and requiring that California officials inform the federal and state governments of the identity of aliens illegally within the United States.[14] The statute makes criminal the creation or use of false documents of residence or citizenship.[15] It prohibits illegal aliens from receiving state social services,[16] including health care[17] and public education,[18] and requires officials in these agencies to verify the legal status of persons who seek their services.[19] State officials must report illegal aliens to the United States Immigration and Naturalization Service.[20] The statute is severable so that the invalidity of one section does not affect the validity of other independent provisions.[21]

The constitutional questions raised by Proposition 187 are complicated and their answers are far from clear. One such issue is the general competence of the states to deal with matters touching immigration policy. More than fifty years ago, the United States Supreme Court in *Hines* v. *Davidowitz*[22] held that Congress, acting under its constitutional authority,[23] had intended to occupy the entire field of immigration law. Thus, a Pennsylvania statute creating a separate state system for alien registration and reporting was preempted, even though the state statute was modeled after the federal alien registration and reporting requirements.[24] Emphasizing the importance of national uniformity in the immigration field, the Court nonetheless pointed out the difficulty of arriving at a decision in such cases: There was no

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[11] "The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field," *Plyler* v. *Doe*, 457 U.S. 202, 225 (1981) (with respect to balancing state and federal interests in control of immigration).

[12] Procedural statutes, like H.R. 1170, should be evaluated solely on the grounds of whether the processes that they require are fair and useful, not in the light of specific current substantive issues that are the subject of existing political controversy. I refer to Proposition 187 here, not because state and federal injunctions against its enforcement suggested the introduction of H.R. 1170 but because the issues that it raises illustrate the truly difficult nature of the constitutional questions that judges often have to address in cases of this kind.

[13] Proposition 187, Section 1 (hereinafter Prop. 187).

[14] Section 4.

[15] Sections 2 and 3.

[16] Section 5.

[17] Section 6.

[18] Sections 7 and 8.

[19] Sections 6(b) and 7(d).

[20] Sections 6(c)(3), 7(e) and 8(c).

[21] Section 10.

[22] 312 U.S. 52 (1941).

[23] U.S. CONST., Art. 1, Sec. 8, cl. 4.

[24] *Hines* v. *Davidowitz*, 312 U.S. 52, 73–74 (1941)

"infallible constitutional test or an exclusive constitutional yardstick. . . ." to determine the appropriate allocation of authority between the states and the nation.[25]

This point was illustrated thirty-five years later when the Court in *De Canas* v. *Bica*[26] upheld a California statute forbidding in-state employers from hiring illegal aliens on the grounds that the regulation of labor conditions within the state was an appropriate matter for California law.[27] Distinguishing Hines, the Court wrote:

> Little aid can be derived from the vague and illusory but often repeated formula that Congress by "occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.[28]

Here the Court examined the state's interest in regulating employment and concluded that values of local self government overrode the general federal concern with regulation of aliens.[29]

Another illustration of the subtlety of constitutional analysis in this field is *Plyler* v. *Doe*.[30] In that case, a five to four decision, the majority[31] found that a Texas statute that authorized local school districts to deny enrollment to children of illegal aliens violated the Equal Protection Clause of the Fourteenth Amendment. Because the children could not affect their parents' conduct nor change their own undocumented status,[32] there was no rational relationship between the children's undocumented status and any articulable federal immigration policy.[33] Thus, the state statute was without a rational basis to justify excluding the children from state funded education.[34] With respect to adult illegal aliens, the majority wrote:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. . . . [T]hose who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation.[35]

The Court's minority,[36] on the other hand, found evidence of a clear federal policy in the immigration laws themselves[37] and concluded that prudent conservation of finite state revenues was not an illegitimate goal.[38] Protecting state assets by excluding illegal alien children from public schools was a rational basis for the Texas statute.[39]

Other cases treating the rights of states to legislate with regard to aliens involve fine policy distinctions similar to those discussed above. In 1973, the Court held in *In re Griffiths,*[40] that a state statute denying legally resident aliens the right to take the state bar examination was unconstitutional. The statute could not meet a strict scrutiny test to show that classification on grounds of alienage was necessary to maintain high professional standards in the bar.[41] Five years later in *Foley* v. *Connelie,*[42] the Court upheld a state statute limiting appointment to the state police force to citizens of the United States on the grounds that there was a rational basis for the state requirement. Police officers participate directly in the execution of

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[25] 312 U.S. at 67.
[26] 424 U.S. 351 (1976)
[27] 424 U.S. at 356.
[28] 424 U.S. at 360, n. 8 (quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 78–79 (1941) (Stone, J., dissenting). Compare *United Nuclear Corp.* v. *General Atomic Co.,* 96 N.M. 155, 198–200; 629 P. 2d 231, 274–76 (1980).
[29] For a more complete discussion of state preemption, including Hines and De Canas, see Harold G. Maier, *Preemption of State Law: A Recommended Analysis,* 83 *Amer. J. Int. L.* 832 (1989).
[30] 457 U.S. 202 (1981).
[31] Justices Brennan, Marshall, Blackmun, Powell and Stevens.
[32] 457 U.S. at 220.
[33] 457 U.S. at 226.
[34] 457 U.S. at 226.
[35] 457 U.S. at 219–220.
[36] Justices Burger, White, Rehnquist and O'Connor.
[37] See 457 U.S. at 251 (1981) (Burger, J. dissenting).
[38] 457 U.S. at 249. (Burger, J. dissenting). "If the federal government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here." 457 U.S. at 242, n.
[39] 457 U.S. at 249.
[40] 413 U.S. 717 (1973).
[41] 413 U.S. at 722–29.
[42] 435 U.S. 291 (1978).

broad public policy requiring discretionary decisionmaking, functions appropriately limited to United States citizens.[43]

Graham v. *Richardson*[44] held that state statutes denying welfare benefits to lawfully resident aliens violated the Equal Protection Clause of the Fourteenth Amendment because it encroached upon the exclusive federal power over immigration, exercised when the federal government established standards for lawful entry.[45] The Court did not address the question whether the state could deny welfare benefits to aliens illegally within the United States.

In the light of this case law, no careful constitutional scholar could possibly conclude that the constitutional invalidity of Proposition 187 as a whole, or of any of its component parts, is clear. To apply the existing case law to the various requirements of that California statute would necessarily require careful policy and case analysis and a style of judicial reasoning much more appropriately carried out by a multi-judge panel than by a single federal trial judge whose principal expertise would normally lie in dealing with important case-specific issues rather than issues of high constitutional policy. There is no reason to believe that state statutes passed by state initiative or referendum in other fields would raise constitutional questions any less important, difficult or arcane than those raised by Proposition 187.

One conclusion is clear. Cases involving the constitutionality of laws passed by state referenda will almost without exception treat substantive issues over which the state and federal governments have overlapping authority and in which these sometimes competing interests must be carefully balanced. In one sense, deciding whether a state action is preempted by national power requires determining whether the values of local self-government, sought to be preserved in the federal structure, are appropriately given effect under the circumstances in the case before the court. That balancing process to determine whether a state statute is unconstitutional on its face in the light of federal constitutional allocations of authority is most appropriately carried out by a multi-judge court.

Why Limit the Provisions of H.R. 1170 to Statutes Passed by Referendum or Initiative?

Necessarily suggested by the comments above is the question, if these benefits flow from adopting a three judge procedure with respect to legislation passed by referendum or initiative, why should we not adopt this approach for all cases in which a state statute is challenged on constitutional grounds regardless of its method of passage? In other words, why not reenact the three judge panel legislation that prevailed for the greater part of this century?

If sufficient judicial resources were available, such reenactment would be worth considering, because it would, as did the three-judge panel requirement when it was in force, either protect, or wisely limit, the results of the people's decisions expressed in the provisions of state law. That legislation was not repealed because it failed to perform a useful function. Rather, it was repealed in large part because it placed such a heavy burden on the federal judiciary that, lacking the resources for appointing and supporting more federal judges, the three-judge panel procedure simply could not be continued for all of the cases that it then covered.[46] The requirement was retained for cases dealing with apportionment and other aspects of voting rights because the importance of those issues made a three-judge court appropriate and the number of cases involved would be relatively small.[47]

There are special reasons for adopting the three-judge panel requirement with respect to laws passed by state initiative or referendum that do not apply in the case of legislation passed in the ordinary course by state legislatures. First, the will of the people finds its most direct form of expression in such a process, without passing through the legislative filter. It is the ultimate expression of the one person, one vote, principle, already made a touchstone for determining the constitutionality of state laws apportioning legislative voting districts.[48]

Second, to gain the benefit of such direct democracy, one trade-off is that the body politic loses the presumed consideration of constitutional issues by legislators before they vote to enact proposals into law. Thus, without the opportunity for such legislative constitutional review, there is all the more reason for a full and fair consider-

[43] 435 U.S. at 297–300.
[44] 403 U.S. 365 (1971).
[45] 365 U.S. at 380.
[46] See *Revision of the Jurisdiction of Three-Judge Courts*, S. Rep. No. 94–204, Report of the Senate Committee on the Judiciary to Accompany S. 537, 94th Cong., 1st. Sess. 2–4 (June 18, 1975) (hereinafter Sen. Rep. 94–204).
[47] Sen. Rep. 94–204, *supra*, at 9.
[48] See text at note 4.

ation of constitutional challenges by panels made up of multiple judges. In those instances, the legislative responsibility for protecting constitutionality is either diluted, in the case of referenda, or non-existent, in the case of direct initiatives. In such circumstances, constitutional scrutiny by more than a single judge seems especially called for to assure that the people's will properly comports with constitutional requirements or that it will be countermanded only by a majority of a multi-judge court if it does not.

CONCLUSION

Hyperbolic political rhetoric aside, the art of legislating generally does not involve making choices between good and evil. Rather, it requires choosing how to distribute the limited resources of the nation among the many worthwhile causes or activities that government might support or encourage. On balance, it seems to me that the benefits inherent in H.R. 1170, Section (l)(b), can be achieved with the commitment of a relatively limited amount of resources without resurrecting the difficulties created by the more generalized use of three judge federal panels in the past.

Mr. MOORHEAD. Thank you.

STATEMENT OF HON. HARRY T. EDWARDS, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. MOORHEAD. I see that Judge Edwards has arrived, and I want to especially thank you, Judge Edwards. I understand that you are deeply involved in trial or in a hearing today on a three-judge panel and——

Judge EDWARDS. Right.

Mr. MOORHEAD [continuing]. That you must get back. So we're going to—we've announced earlier we're going to take you out of order. We're going to ask you questions before we complete the rest of our panel and before we have questions for them, so that you can get back to the courtroom.

We appreciate having the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, and I will start with a few questions for you, and we'll let the panel ask questions and we'll go right back to where we were before.

Judge EDWARDS. Thank you, Chairman Moorhead.

Mr. MOORHEAD. Could you please comment generally on your experience as both a member of the three-judge court panel and as an administrator?

Judge EDWARDS. I put together a few notes, Chairman Moorhead, in response to what I anticipated might be questions, and I'll refer to those, if I may.

Mr. MOORHEAD. Sure.

Judge EDWARDS. And then if there are any additional questions, I'll be happy to answer them.

Mr. MOORHEAD. If you have any statement that you'd like to make at all, go right ahead.

Judge EDWARDS. OK, I'll do that, and it's brief and pointed.

As you know, in 1976, Congress repealed sections 2281 and 82 which required the convening of three-judge district courts. The Judicial Conference of the United States endorsed these appeals on the grounds that the original reasons for three-judge courts had disappeared and the three-judge court procedure constitutes a substantial burden on the judiciary. The Judicial Conference has taken no position on H.R. 1170, and although I'm a member of that Con-

ference, I have no authority to speak on behalf of the Judicial Conference.

Rather, I was called yesterday and asked whether I would speak to the practical problems faced by the Federal courts when we are required to employ three-judge courts in any circumstance. Because my invitation to appear came late, I've had time only to prepare some notes, no formal remarks, and I'll refer to these notes.

I'd like to note at the outset that H.R. 1170 as now written calls for expedited action. I would suggest that, even assuming arguendo that expedition is a good idea, it is folly to think of a three-judge court as facilitating an expedited process; it surely does not. Complications that attend virtually every aspect of a case requiring a three-judge court, from selection to scheduling and conducting hearings and trials, to making a decision, make the process ill-suited for expedited judicial review.

First, as to scheduling, under 28 U.S.C. 2284, a district court judge must notify the Chief Judge of the court of appeals for the need for a three-judge court. If the district court judge fails to seek a three-judge panel, that may be become an issue for review by the court of appeals; that will slow the process. If the matter is referred and the Chief Judge agrees in due course that a three-judge panel is appropriate, section 2284 entrusts the selection of the second and third judge to the discretion of the Chief Judge of the circuit. Our procedure is to select one appeal and one district judge, both on rotation. A strict rotation policy does not take into account differing impacts of selection on the appellate and trial courts or on the schedules of individual judges. And any deviation from a neutral rotation policy to accommodate volunteers or requests for exemptions would leave the courts and the Chief Judge open to charges of panel-packing. So we stick with strict rotation.

The simple truth is that, in the context of legislation like that proposed in H.R. 1170, a section 2284-type process puts a terrible burden on the judges selected because they must adjust their existing schedules to hear an unexpected expedited case. Because of this, it can be a horrendous burden to find time convenient for all three judges and the parties to hear the case. And if several days of hearings are involved, which is very much the case in the voting rights cases that we hear, the problem of scheduling an expedited case is truly awful, especially when judges live in different regions of the country. It is extremely difficult to schedule a trial or hearing when all three judges can participate.

Although section 2284 permits one judge to conduct some proceedings, the limits of that authority are unclear and designation of a single district judge to conduct proceedings can cause resentment among parties and the judge who carries the burden. It is also very difficult to rule on evidence if you've not heard it presented. So usually it would make no sense to use only one judge to try a case if three have been designated.

Now as to hearing procedures: Conducting a trial or any procedure other than a strict appellate-style argument with more than one judge is, quite frankly, a nightmare. Bench-attorney interactions, which are crucial to trial and hearing processes, are extremely hard to orchestrate in a three-judge setting.

Also, with respect to matters of discovery and evidentiary rulings, a three-judge procedure borders on farcical. Three judges cannot act with the same incisiveness as a single judge in making trial rulings.

Actions of the sort covered by H.R. 1170 will require factfinding; that is, weighing evidence in actions submitted under section 1 and determining the likelihood of irreparable harm in the weighing of probable evidence in support of parties' arguments on the merits under section 2. These matters, in my view, are ill-suited for initial decision by multijudge panels.

If the purpose of the bill is to ensure appellate-style collegial review early in the litigation process, appointment of a three-judge court is not necessary. The courts of appeals are well able to hear emergency appeals on an expedited basis. Indeed, under 28 U.S.C. 1657, actions for preliminary injunctive relief are required by statute to be expedited by all U.S. courts. Appellate courts can, and often do, stay district court injunctions if such relief is found justified. In other words, under current practice, an injunction issued by a single judge is subject to expedited review in the courts of appeals.

I happen to think that our system of justice properly allocates the burdens of responsibility between trial and appellant courts. Trial courts focus on factfinding; appellate courts focus on the correction of errors and the development and application of legal principles. When you mix up the two responsibilities, you increase the likelihood of sloppy justice.

I'll be happy to take any questions. And I'll be happy to leave my notes, if the committee feels they would be of use.

Mr. MOORHEAD. Have you had any unusual type of experience being on the three-judge panel? How has it affected your administering——

Judge EDWARDS. The greatest problem that we have, Chairman Moorhead, is with respect to scheduling hearings involving all three judges and the parties. A trial court judge working alone is involved in a very normal routine and ritual in arranging for hearings, motions, and the like, that the parties are prepared to present to the court. So the scheduling problems are relatively minor. When two more judges are involved, at least one of whom is on the court of appeals and is not normally involved with such procedures, it is very difficult at best to find those judges and find a time when all can be available to sit and conduct a trial, and that is the problem that we presently face. And we worry time and again whether we should designate one judge to do it or whether all three of us should be there. And, if it involves a presentation of evidence and we all have to rule on that eventually, it doesn't make sense for all three of us not to be there, but then we run into the scheduling problems.

Mr. MOORHEAD. How many three-judge panels has your particular court been involved with, say, over the last 10 years?

Judge EDWARDS. Our experience presently is mostly with voting rights cases. That is the experience that we presently have.

Mr. MOORHEAD. Are there quite a few of them?

Judge EDWARDS. I was not, because of the lack of time, able to get the exact number. I would guess that each one of the court of

appeals judges probably has no more than one such designation each year. So you're talking about a relatively insignificant number, in your view, I suspect, but, nonetheless, a terribly burdensome process when we're asked to engage in it.

Mr. MOORHEAD. One possibility here, you've indicated that the use of three-judge panels is procedurally difficult when operating in a trial judge, trial court capacity, because of the factfinding duties of the district court operate under the auspices of three courts and then different courts. If 1170 were amended to include only cases where injunctive relief is sought against the enforcement of State laws passed by the voters of the State, of an entire State on a referenda, that's only presenting questions of law as an appellate court. Would that pose the same procedural problems for you?

Judge EDWARDS. The procedural problems are going to be less difficult, but I think you should not indulge the assumption that there are no evidentiary submissions in cases involving preliminary injunctions. That simply is not true. There are evidentiary submissions, and the proceeding may take more than a day, and if it does take more than a day, you're going to run into scheduling difficulties. And you have findings of irreparable harm, for example; they may involve the submission of evidence.

Mr. MOORHEAD. Thank you.

I yield to the gentlelady from Colorado.

Mrs. SCHROEDER. Mr. Chairman, I think we've got a time crunch. I know Professor Neuborne needs to leave, too, by 11:20 because of a plane, and I understand we're going to have a journal vote very shortly. I am wondering what we can do at this point. Is there any way we could have Professor Neuborne give his testimony, and then if everybody has to leave, we do submission of questions by written form, or have you any ideas?

Mr. MOORHEAD. If we do not get to all the questions we have, would each of you be happy to answer questions that are submitted in writing?

Mr. MAIER. Of course.

Judge EDWARDS. Of course.

Mr. NEUBORNE. Of course, Mr. Chairman.

Mrs. SCHROEDER. That might be helpful.

Mr. MOORHEAD. Why don't you go ahead and ask a couple of questions?

Mrs. SCHROEDER. OK. Well, basically, since I would like to also make sure that Professor Neuborne gets to testify, I think I will pass and I will submit written questions.

Thank you very much, Judge, for coming. I know how busy you are.

Judge EDWARDS. Thank you

Mr. MOORHEAD. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I don't have any questions. Judge Edwards was crystal clear in his explanations. I'm sure with my counsel we can think up some questions to ask you, but——

Judge EDWARDS. I'm not soliciting them.

[Laughter.]

Mr. CONYERS [continuing]. But I, too, join Mrs. Schroeder—if two of our three witnesses have a time crunch, we might waive any questions that may someday occur to me.

Thank you very much for your appearance here today.

Judge EDWARDS. Thank you.

Mr. MOORHEAD. The gentleman from California, Mr. Bono.

Mr. BONO. Yes, I'll be very brief.

Judge, you mentioned sloppy justice, which is what I think this is all about. And, indeed, it may be difficult, but I think the bottom line here is that the judicial system seeks justice and in this case we don't get justice. So this is an alternative to get justice in some manner. You also used the word "farce," and I think it's a farce when someone can take a ruling and go shop for a judge. I don't think that is what the system is about, either. So, as unpleasant as this may be, I think it's closer to justice than the system we have currently.

Judge EDWARDS. Congressman Bono, the only response that I was trying to give procedurally—I'm not addressing the subject of the legislation; I don't feel it's appropriate for me to do that. I think Congress has the authority under our system to enact what you feel is appropriate.

The only thing I was trying to make clear is, that from my perspective, the procedures are in place to get quick review if you feel that's necessary. We do it all the time. That is, if a trial judge issues a preliminary injunction, we must give that—that is, the court of appeals must give that—expedited consideration. We do it routinely, and we grant stays in a number of cases where the merits justify it.

So in terms of getting an expedited procedure, what I'm suggesting that you consider is, all things considered, you'll get faster review in many cases in my view if one judge is assigned to hear a case, no matter how that judge comes out, and then you let the normal process play out, because expedited appeal of that injunction is mandated now, and the courts of appeals do it all the time. And then each of us assumes our normal role in the process, and you will get faster justice than you'll otherwise get with a three-judge panel. That's all I'm suggesting.

Mr. BONO. Thank you. Thank you.

Mr. MOORHEAD. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Very briefly, I think to follow up on Mr. Bono's point is in this particular case this judge in California has apparently determined that, even in a matter that involved the votes cast by millions—I understand 5 million voted affirmatively for this referendum, and I assume there were several million who voted against it as well—that he is going to wait 11 months after the initial vote by the voters in November 1994 before hearing the evidence in the case and issuing any decision upon which an appeal could be brought forth to——

Judge EDWARDS. Once a preliminary injunction is issued, it's immediately appealable.

Mr. GOODLATTE. All right.

Judge EDWARDS. Immediately.

Mr. GOODLATTE. Let me ask you along another line. We have a situation here where the Congressional Research Service says that

in the past 10 years there are only 10 instances where this statute would apply, obviously, major circumstances like the one that we are witnessing in California, which would not be affected by this legislation, by the way. I understand there are what, 12 or 13 judicial circuits in the United States?

Judge EDWARDS. Right, 13.

Mr. GOODLATTE. That being the case, the average circuit—and I recognize that there are different numbers of States that have initiative and referendum in different circuits, so it would not be uniformly true, but the average circuit would only get one case in less than every 10 years. So it's not an enormous burden that we'd be imposing upon any particular U.S. circuit.

Judge EDWARDS. I fully appreciate that. What I'm trying to focus on is the problem of adding any kind of case to the three-judge process, especially ones where you're seeking expedition. I'm saying there's an irony in that. If that's your goal, you're not doing it, in my view, in a way to produce that which you want most, expedited process. That's not the way to get expedited process, and the problem is much worse out of the D.C. circuit, where judges live in different regions, and they've got to be put together. That's the irony in all of this.

Mr. GOODLATTE. Would this occur in the D.C. circuit, given the fact that we're talking about the State initiative and referenda?

Judge EDWARDS. Would it likely be brought here? The statute covers D.C., covers D.C., as I understand it. We wouldn't otherwise, I don't think we would otherwise——

Mr. GOODLATTE. So only a—a referendum in the city of Washington, DC——

Judge EDWARDS. I think, as I understand—I haven't had time to study this, but I think that's right, yes.

Mr. GOODLATTE. OK. Thank you, Mr. Chairman.

Mr. MOORHEAD. The gentleman from Pennsylvania.

Mr. GEKAS. Yes. Just to follow up, I take it, then, that the voting rights three-judge panel implementation about which you speak either does not prevent expedited hearings, which it does require, does it not, many times? Therefore, in the attempt by the gentleman from California to extend that to the limited number of referendum cases, the expedited hearing capacity of the three-judge panel in voting rights certainly can be extended to referenda?

Judge EDWARDS. I'm telling you from my experience, as honestly as I can, you don't get expedition.

Mr. GEKAS. You don't in voting rights cases?

Judge EDWARDS. No. No matter what the statute says, it doesn't, in fact, happen because the process is inherently slow.

Mr. GEKAS. Does it require expedition in the voting rights laws?

Judge EDWARDS. I don't—I honestly don't recall. We certainly try in some cases, but I'm telling you, as a practical matter, it doesn't happen in a way that you would call expedited. It's just not possible.

Mr. GEKAS. One other——

Judge EDWARDS. We often hear these cases after the election and we worry about how to remedy it because it's after the fact.

Mr. GEKAS. In just one other case—I'm trying to strain my recollection. When we were involved in impeachment cases, as we have

been, particularly, this committee—in fact, solely this committee, the Judiciary Committee—the Judicial Conference I think indulged in three-judge panels from the various regions where a judge would have been impeached. Do you recall any of that occurring? Did you serve——

Judge EDWARDS. I don't remember the process and I just haven't had time to go back——

Mr. GEKAS. I might submit a written question in that regard.

Judge EDWARDS. OK.

Mr. GEKAS. I thank the gentleman, and I yield back the balance of my time.

Mr. MOORHEAD. Because the judge does have to leave right away, if anyone else has a question they'd like to ask—the gentleman from Florida?

Mr. CANADY. Thank you, Mr. Chairman, and this will be brief.

We appreciate your being here, Judge.

Do you—and I realize this is going to be difficult to answer, but do you have any idea about how long it would ordinarily take the court of appeals to consider an appeal on a preliminary injunction that you spoke of?

Judge EDWARDS. We can do that very rapidly because in many—my circuit is an example of a model. We have motions panels already constituted. So I know as a scheduling matter I take emergencies whenever I'm on motions duty, which in my circuit is for 2 months straight. We get requests for relief on stays, on preliminary injunctions, all the time, and we can act like that in a day or two.

Mr. CANADY. From the time the district court order was entered, how long would it ordinarily take for the court——

Judge EDWARDS. A day or two.

Mr. CANADY [continuing]. To hear it and make a decision and render a decision?

Judge EDWARDS. Really, very promptly. We often have had situations where the district court judge's clerk has called the court of appeals clerk and said a preliminary injunction is likely to issue; be ready for an emergency appeal because we think one is coming. We may issue an administrative stay to block it until we've had time to think about it, and then rule on it, and we do it very promptly. It's routine.

Mr. CANADY. Thank you.

Mr. MOORHEAD. The gentleman from California, Mr. Berman.

Mr. BERMAN. Did I interrupt the gentleman?

Mr. CANADY. I'm done.

Mr. BERMAN. Thank you, Mr. Chairman.

I take it we're just interrupting the panel to just question Judge Edwards at this point?

Mr. MOORHEAD. Yes. Judge Edwards is going to have to leave.

Mr. BERMAN. All right. I missed your testimony, Judge, but I understand you indicated that a preliminary injunction which enjoins the enforcement of a State enactment based on Federal constitutional grounds is immediately appealable?

Judge EDWARDS. Any preliminary injunction is immediately appealable.

Mr. BERMAN. Any? So it doesn't even have to be premised on constitutional——

Judge EDWARDS. Right, it's an exception to the final order rule.

Mr. BERMAN. So that if you wanted this bill because you were angry that a proposition that was passed in California was in a Federal court, the fact is that that Federal judge in Los Angeles has issued an injunction against the enforcement of proposition 187, and if the State of California, if Attorney General Lungren and Governor Wilson, representing the State of California in those proceedings, wanted to go to the ninth circuit, they could have been there weeks ago when that preliminary injunction was issued; they could be in the ninth circuit right now in a fashion that you think, based on your experience, would be far swifter than by requiring Mariana Pfaelzer to be joined by another colleague on the district court and a ninth circuit judge to have a trial on the merits of how that law would be implemented before it might be appealed to a supreme court. Is that——

Judge EDWARDS. Without talking to specific cases which I'm not familiar with, my experience is, yes, preliminary injunctions are immediately appealable and the process is normally very quick.

Mr. BERMAN. And this approach would slow it down?

Judge EDWARDS. In my view, I think three-judge panels slow things down.

Mr. BERMAN. Thank you.

Mr. MOORHEAD. We want to thank you very much for leaving the bench and coming over here to help us, and we'll probably have some more questions for you, and I know you said you would be happy to answer them.

Judge EDWARDS. Thank you, Chairman Moorhead. I'm sorry I was rushed.

[The prepared statement of Judge Edwards follows:]

PREPARED STATEMENT OF HON. HARRY T. EDWARDS, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H.R. 1170 applies the procedures of 28 U.S.C. 2284(b)(1) that are in place for selection of three-judge courts in voting rights cases. These observations are based on the D.C. Circuit's experience with those cases.

1. In 1976, Congress repealed sections 2281 and 2282, which required the convening of three-judge district courts whenever an injunction was sought restraining the enforcement, operation, or execution of a State or Federal statute on grounds of unconstitutionality.

2. The Judicial Conference of the United States endorsed these repeals, on the grounds that: the original reasons for three judge courts had disappeared, and the three judge court procedure constitutes a substantial burden on the judiciary.

3. The Judicial Conference has taken no position on H.R. 1170, and, although I am a member of the Conference, I have no authority to speak on behalf of the Conference.

4. Rather, I was called yesterday and asked whether I would speak to the *practical problems* faced by the Federal Courts when we are required to employ three-judge courts.

5. Because my invitation to appear came so late, I have had time to prepare only some notes, but no formal remarks. I will refer to my notes in giving you my view, as a Chief Judge, of the burdens of a three judge court.

6. I would note that H.R. 1170, as now written, calls for "expedited" action. I would suggest that, even assuming *arguendo* that "expedition" is a good idea, it is folly to think of a three-judge court as facilitating an expedited process—it surely does not.

Complications that attend virtually every aspect of a case requiring a three-judge court, from selection, to scheduling and conducting hearings and trials, to making the decision, make the process ill-suited for expedited judicial review.

7. *Scheduling:*

First, under 28 U.S.C. 2284, a District Court judge must notify the Chief Judge of the Court of Appeals of the need for a three-judge court.

If the District Court judge fails to seek a three-judge panel, that may become an issue for review by the Court of Appeals. This will slow down the process.

If the matter is referred, and the Chief Judge agrees in due course that a three-judge panel is appropriate, section 2284 entrusts the selection of the second and third judge to the discretion of the Chief Judge of the Circuit. Our procedure is to select one appeals and one district judge, both by rotation.

A strict rotation policy does not take into account differing impacts of selection on the appellate and trial courts, or on the schedules of individual judges.

Any deviation from a neutral rotation policy, to accommodate volunteers or requests for exemptions, would leave the courts and the Chief Judge open to charges of "panel packing."

The simple truth is that (in the context of legislation like that proposed in H.R. 1170) a section 2284-type process puts a terrible burden on the judges selected, because they must adjust their existing schedules to hear an unexpected "expedited" case.

Because of this, it can be an horrendous burden to find a time convenient for all three judges and the parties for the hearing of the case.

And if several days of hearings are involved, the problem of scheduling an "expedited" case is truly awful (especially when judges live in different regions of the country). It is extremely difficult to schedule a trial or hearing when all three judges can participate.

Although section 2284 permits one judge to conduct some proceedings, the limits of that authority are unclear, and designation of a single (district) judge to conduct proceedings can cause resentment among parties and the judge who carries the burden. It is also difficult to rule on evidence if you have not heard it presented, so usually it would make no sense to use only one judge to try a case if three are designated.

8. *Hearing Procedures:*

Conducting a trial, or any procedure other than a strict "appellate style" argument, with more than one judge, is a nightmare.

Bench-attorney interactions, which are crucial to a trial or hearing process, are extremely hard to orchestrate in a three-judge setting.

Also, with respect to matters of discovery and evidentiary rulings, a three-judge procedure borders on farcical. Three judges cannot act with the same incisiveness as a single judge in making trial rulings.

Actions of the sort covered by H.R. 1170 will require fact-finding, e.g., weighing evidence in actions submitted under section 1, and determining the likelihood of irreparable harm, and the weighing of probable evidence in support of the parties' arguments on the merits in actions under section 2. These matters are ill-suited for initial decision by multi-judge panels.

9. *A Concluding Observation:*

If the purpose of the Bill is to ensure appellate-style collegial review early in the litigation process, appointment of a three-judge court is not necessary. The Courts of Appeals are well able to hear emergency appeals on an expedited basis. Indeed, under 28 U.S.C. § 1657, actions for preliminary injunctive relief are required by statute to be expedited by all U.S. courts. Appellate courts can, and often do, stay district court injunctions if such relief is found justified. In other words, under current practice, an injunction issued by a single judge is subject to expedited review in the courts of appeals.

I happen to think that our system of justice properly allocates the burdens of responsibility between trial and appellate courts. Trial courts focus on fact-finding; appellate courts focus on the correction of errors and the development and application of legal principles. When you mix up the two responsibilities, you increase the likelihood of sloppy justice.

I will be happy to take questions, if there are any. I will also be happy to leave copies of my "notes" for inclusion in the record of these deliberations before the Subcommittee on Courts and Intellectual Property of the House Committee or the Judiciary.

Mr. MOORHEAD. Professor Neuborne.

STATEMENT OF BURT NEUBORNE, JOHN NORTON POMEROY PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. NEUBORNE. Thank you, Chairman.

As usual, Chief Judge Edwards has made my life a lot easier because he said what I was going to say I think better, and I'll be very brief.

The genesis of this bill, I think, is concern over—and I think Congressman Bono quite aptly puts it—concern over whether the court system in California worked appropriately in connection with proposition 187, and it is an understandable concern that he has. But there's a problem in attempting to reform an entire set of rules based upon the reaction to a single case.

The 187 issue in California is essentially unique, and it's essentially unique, Congressman, because there is an existing Supreme Court precedent that takes away the discretion of the lower courts to do anything. It wouldn't matter; you could have a 100-person court. You could have—you could require every Federal judge in the United States to be sitting on the panel in California, but as long as *Plyler* v. *Doe* is the last word of the Supreme Court, the lower courts, Federal and State, have taken an oath to support and defend the Constitution of the United States as it is construed by the Supreme Court of the United States. So those judges don't have a choice. They have to issue the injunction.

That's why the attorney general of California has not availed himself of the remedy that Chief Judge Edwards discussed, an immediate appeal to the ninth circuit. There is an immediate appeal to the ninth circuit from the California district court, but the reason that the California lawyers are not pursuing it is that they know it would be a futility at this point because the Supreme Court's writ would require the ninth circuit to affirm the injunction. It would simply be a matter of form.

Now if you convened a three-judge court, they would have to do the same thing. And so I urge the committee, in thinking about whether to change the three-judge court rules with respect to referenda, not to think about the aberrational case where a referendum flies in the teeth of an existing Supreme Court precedent, and that the purpose of the referendum is to require reconsideration of the precedent, which is what is taking place. The people that sought that referendum are getting exactly—exactly—what democracy assures them, and that is they are angry about a Supreme Court precedent; they have challenged that Supreme Court precedent through the enactment of a referendum, and that referendum will force the courts to reconsider the precedent.

But there's no way that you can release a lower Federal court judge from her obligation to follow Supreme Court precedent. So that it wouldn't matter what judge this was before; that injunction was a foregone conclusion, and every careful constitutional lawyer in America knew it.

Now the more general issue about whether or not we're going to improve the quality of justice, because Congressman Bono is absolutely right, that's what this bill should be about. We should be asking whether the quality of justice will be enhanced by requiring a three-judge court. He's put a finger on one place where the quality of justice might be enhanced, or at least one place where we

should be concerned about it. If you think that judge shopping is going on at the district court level, if you think that people are actually choosing judges based on how they think they're going to rule, that's something that you should be concerned about, and that's something that should be reformed. But the way to reform it is not to impose a three-judge court, a very inefficient and wasteful process. The way to change it is to assure that random selection of judges actually goes on at the district court.

My understanding is that random selection of judges is in place in every single district in the United States. If it is not being adhered to, that is something that this committee should be concerned about and should do something about. My understanding is that it is being adhered to; it is not currently a problem, but if it is, it's something that you should deal with, but not by the imposition of a three-judge court.

My experience, I think the reason why I was asked to appear here—and I'll just very briefly recount some experience. I'm a lawyer who practiced constitutional law in the old days under the pre-1976 three-judge courts. I was the assistant legal director of the American Civil Liberties Union in the early seventies and one of its staff litigators from 1967 to 1972. So I must have tried 50 to 100 three-judge courts in my day.

And when I heard Chief Judge Edwards use words like "nightmare" and "farce," that's exactly right. We felt sometimes that we were trapped in a Kafka novel; that this wasn't really the kind of justice that we went to law school to do. Can you imagine a situation where three judges are hearing a case and they have to rule seriatim on the evidence, and they rule 2-to-1 about whether a particular piece of evidence is or is not hearsay or should or should not be admissible, or whether or not discovery is to be permitted or what the—or even ministerial things like scheduling and when the next hearing is going to take place?

The allegations of stacking the panels were rampant because there were always questions about—you knew that the single judge was picked randomly, but it was always a mystery how the other two judges would appear. And no matter who you were, if you didn't like the composition of the panel, you were certain that somewhere nefarious acts had taken place to put the wrong people on your panel. So that the integrity of the three-judge courts was always at stake.

There wasn't—in 1976, when they were abolished, there wasn't a single constituency in the constitutional litigation world that supported them, nobody, not the Government, not the civil liberties world, not the voting rights people. They were retained in voting rights as a political compromise to assure immediate Supreme Court review of apportionment cases. It was a terrible mistake. What you should be doing is abolishing three-judge courts in Voting Rights Act cases. You should be abolishing three-judge courts everywhere because they just don't work. And that's the unanimous verdict of everybody who's dealt with them; they just don't work.

[The prepared statement of Mr. Neuborne follows:]

PREPARED STATEMENT OF BURT NEUBORNE, JOHN NORTON POMEROY PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. Chairman and Members of the Subcommittee, thank you for this opportunity to discuss the suggestion that constitutional challenges to laws enacted by referendum be heard by a three-judge District Court, with an appeal directly to the Supreme Court.

I am a Professor of Law at NYU and served as National Legal Director of the American civil Liberties Union from 1982–86. More importantly for the purposes of this hearing, I served on the ACLU Legal staff from 1967–74 and participated in numerous three-judge court proceedings. I appear at the invitation of the Committee's minority memory.

As the Committee knows, from 1908–1976, constitutional challenges to state statutes were heard by three-judge tribunals similar to the courts envisioned by H.R. 1170. In 1976, virtually everyone connected with constitutional litigation, regardless of political persuasion, agreed that three-judge courts were an unnecessary waste to scarce judicial resources and a cumbersome and inefficient way to deal with a complex legal proceeding. Accordingly, three-judge courts were virtually abolished by Congress, except in certain voting rights cases and in settings where Congress wished to assure immediate review by the Supreme Court of an important federal statute. Predictably, three-judge courts have continued to perform very badly in those narrow settings where Congress has retained them. In my opinion, three-judge courts simply cannot provide an efficient procedure to test the constitutionality of statutes (state or federal). It would, therefore, be a genuine mistake to extend the use of three-judge courts to cases challenging the constitutionality of state laws enacted by referendum.

1. THE HISTORIC NEED FOR THREE-JUDGE COURTS NO LONGER EXISTS

Three-judge courts were initially established to deal with two evils. First, at the turn of the century, federal procedure permitted a judge to issue an *ex parte* injunction that could paralyze an important state statute without the possibility of a hearing on the merits. Moreover, such an *ex parte* order was often deemed unappealable because it was interlocutory. The net result was the possibility that a single judge, acting *ex parte,* could freeze state law for extended periods of time with virtually no possibility of appeal. Requiring the concurrence of three judges was seen as a way of assuring that the *ex parte* power was not abused.

Modern procedure has abolished the *ex parte* injunction. Before a contemporary judge can issue a preliminary injunction, she must hold a careful public hearing at which the law and the facts can be considered. Moreover, a preliminary injunction issued after such a hearing is now deemed a final order, permitting an immediate appeal to the Circuit by an aggrieved party.

Second, at the turn of the century, litigants could maneuver a case before a friendly judge by the simple expedient of presenting the judge with an application for an *ex parte* injunction. Requiring a court made up of three judges made it less likely that the litigants had stacked the court.

Today, the procedures in effect in every District require the random selection of judges, making it impossible to use unfair tactics to judge-shop. Thus, the twin evils of unappealable *ex parte* orders and rampant judge-shopping that gave rise to three-judge courts no longer exist.

2. THREE-JUDGE COURTS WASTE VALUABLE JUDICIAL RESOURCES

A three-judge court wastes valuable judicial resources in two ways. First, it requires three judges (including one Circuit judge) to do the work that is usually done by a single trial judge. In a system that is desperately starved for resources, requiring three-judge trial courts literally triples the judge time needed to process the preliminary aspects of a case (discovery, for example). Moreover, requiring a three-judge tribunal triples the judicial workload associated with factfinding. Since factfinding is the most labor intensive part of the litigation process, requiring three-judge courts is the equivalent of removing two/thirds of the judicial resources available to hear the cases in question.

Second, the three-judge court process distorts the review processes of the Supreme Court. In cases handled by a single judge, when a case comes to the Supreme Court, it has already undergone trial level factfinding and one level of appellate review. Three-judge court cases, however, do not undergo any appellate review prior to Supreme Court review. Thus, in three-judge court cases, if any appellate review is to take place, it must occur initially at the level of the Supreme Court. Forcing the Court to function as a first-level review tribunal is, however, an inappropriate impo-

sition on its extremely scarce resources. The Supreme Court hears literally thousands of petitions for review each year. It is wrong to impose upon the Court by turning review petitions in three-judge court cases into requests for an initial appellate hearing.

Proponents of H.R. 1170 argue that the additional judicial workload engendered by three-judge courts is tolerable in referendum cases because there are so few of them. Such an argument overlooks a number of important points. First, any unnecessary increase in the workload of the federal courts is inappropriate. This Committee is aware that the workload of the federal courts has reached crisis proportions. Every unnecessary increase should be resisted.

Second, proponents overlook the fact that challenge to referenda will be disproportionately centered in particular Circuits. The use of initiative and referendum as a legislative device is more likely to be found in Western states. It is likely that the brunt of the additional workload imposed by H.R. 1170 will be felt in the 9th and 10th Circuits. If there is one Circuit that simply cannot absorb additional workload, it is the Ninth.

Third, referendum cases are likely to involve complex issues of fact. Often, the issue in a constitutional case turns on the factual need for the law. In non-referendum cases, a legislative record will often have developed much of the factual material needed to test a law's factual necessity. By definition, however, referendum cases lack a formal legislative record. Thus, a referendum case is likely to impose significant fact-finding burdens on the trial court.

Finally, it will prove extremely difficult to require referenda to undergo three-judge court review, while relegating legislation enacted through traditional representative democracy to single-judge courts. In effect, H.R. 1170 sets up two classes of democratic activity. Referenda are deemed "first class" democratic exercises worthy of three-judge court review. Statutes enacted by legislatures are seen as "second class" exercises in democracy meriting single judge protection. There is, however, no consensus that referenda are superior to ordinary legislation as exercises in democracy. Quite the contrary, the Founders profoundly mistrusted direct democracy because of its capacity to be swayed by passion. Certainly, Congress should not discriminate in favor of referenda and against legislation in setting up procedural ground-rules. Thus, if Congress resuscitates three-judge courts when referenda are at stake, it is only a matter of time until three-judge courts are restored across the board.

3. Three-Judge Courts Perform Extremely Inefficiently

My experience with numerous three-judge courts in the late 1960's and early 1970's was that they were procedural nightmares. The simple logistical necessity of assembling the three judges in a single courtroom took enormous energy. In Circuits where the judges are widely separated, the task often bordered on the impossible. Not only was the trip difficult, but the court calendars of the travelling judges had to be suspended while he or she was away. In widely dispersed Circuits like the 10th, the three-judge Court would have to be assembled at enormous cost—both economic and human.

Moreover, once the Court was assembled, it was impossible to keep it in continuous session in order to hold factual hearings. Judges would be required to go back to their courtroom for emergencies. The tension in the courtroom was palpable because the judges understandably wanted the case over so that they could return home. Pre-trial proceedings were a quagmire. Discovery issues consumed enormous resources. Hearings on preliminary or final injunctions became immensely complex. For example, every evidence objection had to be ruled on seriatim by the three judges. The net effect was to force the judges to strain against fact-finding and to attempt to turn every case into a farcical exercise in pure law. It is, however, folly to set up procedural mechanisms that inhibit the kind of careful factfinding that should be the hallmark of judicial review.

My experience is reinforced by he melancholy history of contemporary three judges court proceedings. In *FCC* v. *Turner Broadcasting,* 114 S.Ct. 2445 (1994), Congress provided for three-judge court review of the Cable Act of 1992. The procedural results have been a certified disaster. The time of three judges is now being consumed in a fact intensive trial level inquiry that should be the province of a single judge, subject to appropriate review by the Circuit.

I believe, therefore, that three-judge courts should be left to slumber in well-deserved obscurity.

Mrs. Schroeder. Professor, we have a vote. That's why we're walking out.

Mr. NEUBORNE. I understand. I understand. I'm used to having my students walk out all the time. So it's all right.

[Laughter.]

Mr. MOORHEAD. Mr. Conyers, did you want to ask a question before you go?

Mr. CONYERS. I wanted to thank Professor Neuborne for his excellent testimony.

Mr. NEUBORNE. Thank you, Congressman.

Mr. MOORHEAD. We are, obviously, left with a vote on, but I know your time is controlled and I don't want to adjourn during this period. I hope somebody gets back and I can get over and vote.

Mr. NEUBORNE. Well, I hope you'll feel free, Mr. Chairman, to submit any written questions that you have to us in New York, because I'll be happy to respond to anything that any member of the panel wishes to pose.

Mr. MOORHEAD. Mr. Maier, what's your response to Mr. Neuborne's contention that there is no process problem in this case.

Mr. MAIER. That there's no "what" involved?

Mr. MOORHEAD. Process problem.

Mr. MAIER. Well, let me address that more generally. For one thing, Congress makes a serious error, and it does it regularly, when it tries to address procedural issues in the light of specific substantive questions. Often the substantive question—in this instance how one should treat illegal aliens under proposition 187—gets tied up with the question whether a particular form of review is appropriate for cases of this general type. I think these are two different questions, and I think if we don't address them as two different questions, we make a mistake.

Having said that, I will now say that I consider myself a careful constitutional lawyer and I read *Plyler* v. *Doe* differently than does Professor Neuborne. As I read it, that case applies only to questions of withholding public education from children whose parents are illegally within this country. There are several other elements of proposition 187 that have also been enjoined that have nothing to do with children or education. It is not entirely clear to me, as I read *Plyler,* whether the general language of that case, now 14 years old, would (a) be adopted by the current Supreme Court and (b), if it were, would be applied to, for example, questions involving the requirements in proposition 187 that State and Federal officials be notified when persons are identified by State officials as being illegally within the United States.

So I disagree with Professor Neuborne's generalized statements about the clarity of Federal constitutional law on this issue, but I don't think that this substantial issue is before this committee. I think the issue before this committee is a relatively narrow and important procedural one. That issue is whether the ultimate expression of the one-person, one-vote principle ought to be protected in the same way in which the one-person, one-vote principle is protected with respect to congressional apportionment, that is by providing for three-judge panel review of its constitutional validity.

I would certainly be glad at some point to address the general question whether section 2284 itself performs a useful role in the Federal statutory structure. I happen to think that it does, but I do think that if the committee gets itself beyond the specific cur-

rent question with which it's dealing, it will find itself spinning wheels and not, in fact, addressing the issue before it.

Mr. MOORHEAD. Professor Neuborne——

Mr. NEUBORNE. Yes, sir.

Mr. MOORHEAD [continuing]. You mentioned the fact that in this particular case in California people were upset. In most cases where there is an initiative or a referendum, people have been really upset about something. And the States, especially the Western States, that have adopted initiatives and referendums have done so because they can't get what they want out of the State legislatures, and I know quite often they're by special interest groups.

But because there's so many of them and they are upset, you've got to do things that allow them at least to feel that they're getting their day in court and they aren't being put off like they are for months on that situation in California at the present time. They feel that justice has been denied them.

I'm going to have to leave, but you can answer this question. Mr. Goodlatte is going to take over the chair. I'm going to see if I can get my vote in.

Mr. NEUBORNE. I completely understand, Mr. Chairman.

The question was, isn't a bill like this needed to give the voters in California who supported proposition 187 the sense that they're getting their day in court, and that if there is a procedure which appears to freeze the referendum for an extended period of time without a careful judicial hearing, won't they feel that the process has betrayed them in some way? And, of course, that's a very good point. They should sense—a voter who supported proposition 187, just like a legislator who supports a bill that's been struck down as unconstitutional, is entitled to a sense of justice, to a sense that the system cares about their concerns and is processing those concerns in the justest way possible.

I don't see a breakdown in the California process, though; that's the concern. The California process—the process that operates in every single one of these cases is that a single judge has the—a single, randomly-selected judge—it must be a randomly-selected judge; if it isn't, then the process is not operating as it is supposed to under the rules, and that's something that somebody should do something about. But a single, randomly-selected judge has the power to find facts necessary to issue a preliminary injunction, and that was done in California. That's not done behind closed doors. That's not an ex parte order. It's not an order that's done without full adversary process.

The Federal rules have corrected what was a terrible abuse at the beginning of the century by assuring that ex parte preliminary injunctions cannot issue. There's no such thing as an ex parte preliminary injunction. It must be held—it must follow a full and fair, open public hearing.

Once the preliminary injunction is issued, the Federal Rules of Appellate Procedure provide for immediate appeal to the court of appeals, immediate appeal, and expedited.

Mr. GOODLATTE [presiding]. Well, Judge Edwards made that point. I think it's a valid point, but what about the issue of forum shopping that has been raised here? Doesn't a three-judge panel help to assure some greater impartiality that can't choose——

Mr. NEUBORNE. Actually, Congressman, it doesn't. I mean, my experience—as I mentioned I think just before you came in the room, I have tried a number of these three-judge court cases as a young lawyer back in the late sixties and early seventies, when I was working for the American Civil Liberties Union. The trouble with the neutrality of the three-judge courts is that the single judge, the initial Federal district judge, is picked out of a hat. It should be random selection. So there you have——

Mr. GOODLATTE. It should be, but the allegations in this case are that it was not.

Mr. NEUBORNE. Well, if it wasn't, it seems to me that that doesn't call for three-judge courts. That calls for the discipline and the enforcement of the existing rules requiring random selection of judges. Now, as far as I know, they were followed in this case, but who picks the other two judges? That's the problem, Congressman. Once you have a single judge come out of a hat, and then two more judges mysteriously appear next to that judge——

Mr. GOODLATTE. Judge Edwards explained that they were also chosen on the basis of rotation.

Mr. NEUBORNE. Well, they're chosen on the basis of rotation, but my experience has been—and I think the Chief Judge would bear me out—that the rotation has to be broken. It has to be broken because, for example, one of them will be in the middle of a murder trial. He'll be presiding over something which can't be—or the other one will be in the middle of hearing an appeal. And so my experience has been that you wind up with volunteers on these panels, and that's terrible.

Mr. GOODLATTE. Well, but a true rotation system would always recognize that there are going to be members of the panel who, when their turn comes up, may be unavailable and the rotation would simply move on to the next person in rotation at random without that occurring.

But it seems to me that, beyond that, you also have this issue of whether or not, given the severity of issuing an injunction, particularly in a matter as important as one that millions of people have cast their votes on, and, as you say, may have some personal feeling about it once they have made that decision on their own, that decision, it seems to me, is going to be more restrained and more carefully thought out when you have three people having to make it rather than simply one.

Mr. NEUBORNE. Well, the problem, of course, Congressman, is that the process that has to go—that has to be gone through before one can do that is a complicated process. The assemblage of the three-judge court, the presentation of the evidence, the—you're essentially saying that, because this is a referendum, we should triple the judicial workload. And my sense is that the rate of return that we get from tripling the judicial workload is completely symbolic because under the existing—under Congressman Bono's bill, what you get is you get three judges. Three judges will pass on this, and then a direct appeal to the Supreme Court. Under the existing rules, you get a single trial judge, three court of appeals judges pursuant to an immediate appeal, and then the Supreme Court. So the truth is, under this bill, you lose a judge. Instead of four people thinking about the injunction, you're down to three and

you're down to three working under very, very unprofitable circumstances, under inefficient circumstances. So the quality of justice is not likely to be better. It's not likely to be better.

Mr. GOODLATTE. Professor Neuborne, I understand that you are under very severe time constraints, and I would ask if the gentleman from California has a quick question or two, and then we would thank you for your——

Mr. NEUBORNE. It's kind of you to remember. Thank you.

Mr. GOODLATTE. Mr. Bono, Mr. Neuborne is under a constraint to leave here——

Mr. BONO. Yes.

Mr. GOODLATTE [continuing]. Momentarily. Do you have any very quick questions you'd like to ask——

Mr. BONO. Yes. Unfortunately, I had to leave when you talked about what I thought was the most pertinent part of the bill, is the ability to judge shop and have the process—obviously, the action become dilatory only, you know, and not really serve justice at all, but just serve opposition because of the bias of that particular justice.

Mr. NEUBORNE. Well, I think judge shopping is wrong, Congressman Bono. I join with you in—I would—if you would like to try to think about a way to prevent judge shopping in these cases, that's something that I would be honored to work with you on.

Mr. BONO. Yes.

Mr. NEUBORNE. I just don't—I think here the cure is worse than the disease. Imposing a three-judge court as a cure for the judge shopping strikes me as being just too much.

Mr. BONO. I thought Professor Maier had a couple of suggestions that bypassed—or that dealt with the problem that you're talking about specifically. So I'm not at all unwilling to look at options. I think the idea is to eliminate that kind of bias and to be certain that justice is represented.

Mr. NEUBORNE. Thank you.

Mr. BONO. So thank you for your offer; yes, by all means.

Mr. NEUBORNE. Thank you, sir.

Mr. GOODLATTE. And if there are no further questions, we do thank you for coming this long way and for your testimony.

Mr. NEUBORNE. My pleasure, sir.

Mr. GOODLATTE. Thank you.

Professor Maier, would you prefer—like to comment on the same points that Professor Neuborne just raised?

Mr. MAIER. There were several. Let me go back to the question of judge or forum shopping first. That activity takes two forms. One, of course, is the general proposition—I think Professor Neuborne is right, that there are provisions in the judicial code, and certainly in the organizational structure of Federal courts that are designed to prevent that. On the other hand, whether the design actually functions in the way in which it is supposed to function, particularly since it's an internal system issue within the courts, I'm not entirely sure. I do know that attorney friends of mine, by watching Federal judicial assignments, do their best to bring a case before a favorably-inclined judge when possible, not just in cases of this kind, but of any kind.

Well, I disagree with Mr. Neuborne. I don't think that's bad law or bad practice. I think that's what you do when you're representing a client, if in fact the judicial rules permit you to do it. There's nothing unethical about it. And one question, of course, that this panel is addressing is whether we should let that happen in this kind of a case.

The second issue with respect to the three-judge court doesn't go to the question of judge or forum shopping; it really goes to the question of how many voices are we to have at this early stage in determining whether a particular statute passed by referendum in the State is constitutionally valid. That's a different question.

Judge Edwards said something that is accurate insofar as it applies to 1170, article 1(a), but I think is inaccurate with respect to all of the cases that would arise under 1170, article 1(b). He was talking about the need for facts to show irreparable harm with respect to a preliminary injunction. That is, in order for a preliminary injunction to issue, irreparable harm has to be shown with respect to the particular parties seeking the injunction.

That's certainly true when we are dealing with the statute as applied to a particular individual; that is, for example, whether irreparable harm would arise if, in fact, a person were prohibited from practicing medicine because of an unconstitutional application of a State statute which, in effect, was racially discriminatory or ethnically discriminatory.

On the other hand, when one is dealing with generalized legislation such as proposition 187—and there are other pieces of legislation like that as well—the principal issue there is exactly the one that Professor Neuborne addressed, except my conclusion, as I suggested earlier, is not nearly as clear as his is. The question is, what do the Supreme Court cases tell us about the rights of States to regulate illegal aliens.

In this situation we don't have factfinding involved in answering this general question. Now that doesn't mean facts aren't relevant. Obviously, generalized facts about how many aliens there are in the community, whether they work or not, do they pay taxes even if they're illegal aliens, and so forth, but I'm not sure about that—facts that would have to be considered. That kind of information, however, is normally not subject to the evidentiary rules involving, for example, hearsay, relevancy, things of this kind. Rather, information comes in; the court looks at; it can be done by affidavit, which, in fact, is one way of doing it in the ex parte cases. Now ex parte hearings are certainly often an unfair procedure.

But I'm suggesting to you that all constitutional review of State statutes does not necessarily involve a trial on factual matters related to a particular person. If the first part of H.R. 1170 is amended to avoid that, then we come to the question of whether H.R. 1170, is an appropriate addition to those statutes already given three-judge hearing status under U.S.C. 2284. It seems to me to be generally like the kinds of statutes in which Congress has, in fact already required the use of three-judge panels.

As you can tell, of course, this is not an open-and-shut issue, which may be all the more reason for having three, rather than one, Federal judge address the ultimate questions of substance, as

well as having a congressional committee address the issue of whether we ought to have three-judge review in the first place.

Mr. MOORHEAD [presiding]. Go ahead.

Mr. BONO. Thank you, Mr. Chairman.

Your comments are very helpful and very to the point. I do, in fact, think that this problem does exist and will continue to exist unless it is addressed. And, as I said before, I think your recommendations to tighten this bill up are very effective and would work well, and probably cause less of an effort to the judicial—to the court system, and still prevent the problem, which is my goal.

Again, not being an attorney, I see—my vision is much broader than yours, of course, but it is definitely there, and it is definitely resented by a great—a large portion of the public who puts in a hard effort. So I appreciate your suggestions, would like to work further on implementing those alterations.

And, as I understand you, your comment is with the implementations of tightening up this bill, that you would think it would be an effective——

Mr. MAIER. Yes, I do.

Mr. BONO. That's great.

With that, I have no other questions, Mr. Chairman.

Mr. MOORHEAD. I yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Yes, Mr. Chairman, I understand that my colleague from California has indicated, I think both in statements I've read in the press and at the hearing before I got here today, that a goal of this proposal is to plug up a loophole which allows opponents of a voter-passed initiative to forum shop for a judge, who could then enjoin the legislative scheme adopted by the voters. Is that a—am I correct, if I could yield to the gentleman from California?

Mr. BONO. Yes. Thank you.

Mr. BERMAN. It's been a long time since I did it, but in my practice in Federal courts, at least in California, forum shopping in State courts was far more easy than forum shopping in Federal courts. The Federal courts had a mechanical process based on the moment you filed whose name came up at that particular point, and in a place like California you're dealing with multicourt districts, whereas in State court you know who's sitting in writs and receivers and you know who's sitting in law and motion, and you can make some decisions both in terms of county and judge.

Is my recollection, Professor Maier—as a general rule, your ability to forum shop in Federal court is——

Mr. MAIER. Is less than in State courts.

Mr. BERMAN. Yes.

Mr. MAIER. I don't think there's any doubt about that. I assume you're not suggesting one ought not to address the problem if it exists in Federal courts, because one can't address it in State courts?

Mr. BERMAN. No, no, no. I'm just——

Mr. MAIER. But, in fact, the principal problem of forum shopping is in State courts, and there are reasons for that. Federal judges are appointed for life. Most State judges are not. Many have to run for election. Therefore, the fact that one shops for a State forum necessarily seeks to include a political component in that judge's response. One can figure out in part what kind of component one

might get based on whatever the judge might have said when he or she ran for election.

Mr. BERMAN. But it goes beyond that. I agree, and that's a theoretical construct which I would accept. In Los Angeles, if I want to go to Federal court in a case to seek a temporary injunction, I have no idea which Federal judge I will get when I go to file my complaint and petition. If I go to State court, at least this was true 20 years ago, and Department 65 of L.A. County Superior Court is where writs and receivers—and the judge there—and you end up, if you do a lot of that, you know a lot about the judge who's sitting in that court. That's where you're going to end up having your preliminary injunction decided, and you can make decisions about where to go based on your knowledge on that.

My second question——

Mr. MAIER. I don't think we disagree.

Mr. BERMAN. OK. My second point is, again, on this forum shopping issue. The selection of the three-judge court—the selection of the three-judge court gives a level of discrimination to one person that doesn't exist in merely going before a district court, and that is the presiding judge of the circuit, who has to pick—as I understand the process, how it works, you file—you perhaps will get your first judge on a random basis, but then the presiding judge will now pick an appellate judge and an additional district judge to fill out the three-judge panel. So that in some ways there's a little more discretion in this context perhaps than there is in the simple filing before a Federal judge. Is that a——

Mr. MAIER. Well, the discretion lies with the judge who makes the selection, obviously——

Mr. BERMAN. And who makes the selection?

Mr. MAIER [continuing]. As distinguished from the lawyer who seeks out the court. But I'm not sure I understand——

Mr. BERMAN. Oh, because if I——

Mr. MAIER [continuing]. The point.

Mr. BERMAN. Because if I'm looking—I know who is the presiding judge in the circuit in which this case goes, and if I conclude that I'm a little nervous about who that judge is going to select, that may steer me to State court, or if I know it's going to be a judge who might be sympathetic to the issues I'm raising in this case, I might argue for going to Federal court and taking my shot there.

Mr. MAIER. You might do that. One necessarily introduces someone's discretion into the initial selection process. I don't think the issue here is whether a Federal judge or any judge, for that matter sits down and says, well, now let's see, how can I get my political viewpoint made properly? That's not what we're talking about. What we're talking about are policy predispositions, that we all have. We don't lose those because we become judges, even though, of course, I think all judges try to. So that's certainly true. I'm not talking about situations where a Federal judge might say, "I don't like that legislation. Therefore, I'm going to get it."

What we do have, however, are situations in which judges are predisposed to hear certain kinds of arguments with a different ear than they hear others. That's because we're all human beings and

we're lawyers, and how we listen to high constitutional policy issues tends to reflect our predispositions.

In my own view, the most important part of this legislation is not that it prevents forum shopping, although I think it does inhibit that. I don't know about——

Mr. BERMAN. Why? Why?

Mr. MAIER. I don't know California procedure. Of course, I didn't come particularly prepared to look into California procedure but I have no reason to suggest that it would operate otherwise than you say it does. It seems to me that the opportunity for an individual lawyer to pick a particular judge or forum to hear a particular injunction is significantly limited by this proposal. My own view of this legislation's validity is not especially influenced by its ability to prevent forum shopping for Federal judges although that is one element I mentioned in my paper. I am rather more concerned with whether we get a more dependable constitutional review at the outset in cases of this kind in which we're not talking about attempting to avoid irreparable injury to a particular individual, but rather about the general constitutionality of a State statute under existing constitutional language and judicial interpretation.

It seems to me that when we're dealing with legislation passed by referendum or by initiative, H.R. 1170 is an appropriate additional use of the three-judge panel. It is similar to other legislation related to protecting voting rights or the effectiveness of their exercise already incorporated under U.S.C. 2284. In my view, that's the most important reason for the legislation, although I do think, to the extent that in some States shopping for Federal judges might be possible, that this bill would also reduce that opportunity as well.

Mr. BERMAN. Well, from what you are saying, then, the forum shopping part of this is not what attracts you to this?

Mr. MAIER. Not me, particularly——

Mr. GEKAS. Would the gentleman yield?

Mr. MAIER [continuing]. Although I think it's a relevant issue.

Mr. GEKAS. Would the gentleman yield?

Mr. BERMAN. Sure, sure.

Mr. GEKAS. The gentleman may be correct, I believe, the gentleman from California, who has yielded to me, may be correct in assuming that it's difficult to judge shop because of the rotation lists that probably apply there as anywhere else, but in this statewide type of case there is the ability to do limited forum shopping, don't you agree? That is, which area and which circuit court and which court of appeals is more likely to be receptive to your issue? So that even if your lack of worry about judge shopping might be correct, forum shopping would still apply? And I ask that to the witness or the gentleman from California.

Mr. BERMAN. Just—I'll give you my little California anecdotal experience. It's no secret a lot of this is motivated by a case in district court in the Los Angeles Central District. That ain't the district you would bring this case in if you're trying to somehow calculate the odds of any particular district of California to do all of this stuff—I mean, that you're talking about a State with large numbers of Federal judges in each district where this case could be brought.

So I see what you're saying and the answer is, yes, you would have the discretion to go into San Francisco or to Los Angeles——

Mr. GEKAS. Right.

Mr. BERMAN [continuing]. Or to San Diego or Sacramento.

Mr. GEKAS. And that's the point——

Mr. BERMAN. But there is no district court for Orange County yet. So——

[Laughter.]

Mr. BERMAN. Let me just ask my one last question, though.

Mr. MAIER. Yes, sir.

Mr. BERMAN. This issue, you sort of said you usually don't see trial—well, actually, two more questions. The first one is, from what you just said, you're saying the fact that the law was passed by the voters, is a more important reason to convene this three-judge panel with direct appeal to the U.S. Supreme Court than the extent and weightiness of the Federal issues that are presented by the case. We are not going to do it based on the importance of the issues, but by virtue of how the law was passed; is that a fair——

Mr. MAIER. No, I don't think so. I think what I was saying is that issues related to the validity of the direct exercise of the one-person, one-vote principle, like referendum and initiative ought to be treated in the same way as issues related to proper apportionment of congressional districts, and other issues related to voting rights.

Mr. BERMAN. I don't understand.

Mr. MAIER. Well, because it——

Mr. BERMAN. A referendum is one way—a referendum is defined as any popularly-passed measure, anything that the voters are asked to vote on directly, as opposed to something passed by a legislative body. You are saying the test here is how the law was passed that you are seeking to enjoin, not the importance of the Federal issues involved.

Mr. MAIER. I think that's right, for the reasons I suggested. When we're dealing with a direct statement by the voters of what they want done, it seems to me that the public perception of the validity of the constitutional review in a case of that kind would be increased, improved immeasurably, by having the initial decision made by a three-judge Federal panel rather by a single judge.

Mr. BONO. Will the gentleman yield?

Mr. BERMAN. Sure.

Mr. BONO. I just want to point out that when the public makes an effort like this, they don't have an entire judicial committee to work off of and hammer each detail and dot every "i" and cross every "t." And I think that has to be factored into part of this discussion, that they don't have the advantages that we have here when we're part of government.

Mr. BERMAN. But, if I may just reclaim my time, this doesn't distinguish between—as if anything was just a voter-inspired—somewhere some people are sitting around and writing something that's proposed to the voters. This doesn't distinguish between matters coming from the public or part of the public and any legislative body. This distinguishes by how it was passed. So, as I understand it, to the extent that you might ever raise Federal questions which would justify the exercise of Federal jurisdiction, the term "referen-

dum" as defined in here includes bond issues put up by the legislature for voter approval. It includes a whole series of technical amendments to the Campaign Reform Act of 1974, which says any changes must be made by vote of the people. It draws a whole series of things which have nothing to do with a popular process exercise of the authority, unlike, say, proposition 187, but simply because the mechanism in that State requires voter approval.

And I don't quite see the rhyme or reason for that kind of a treatment. Why——

Mr. BONO. Would the gentleman yield?

Mr. BERMAN. Sure.

Mr. BONO. I hear what you're saying. First of all, I was referring to—you were kind of making the point, I thought, that because it is a referendum, that it shouldn't have any more attention than anything else. That's the gist that I got. And I guess my point that I was trying to make to you was that referendums don't have the kind of attention that legal matters have here or all the expertise loading up on it that they do here. That was the only reason I brought that up.

Mr. BERMAN. No, I agree. First of all, I think I understand. There is something about a publicly-inspired action that circumvents the legislative process because that process hasn't dealt with the issue that we want to give special attention to. I think the argument that the people who proposed it didn't have the ability to refine it through a process is an argument against rushing this to a three-judge panel. It's an argument for more scrutiny, and from what we heard from Judge Edwards, rushing to a three-judge panel is an oxymoron or something. It doesn't happen quite like that.

But I guess the only thing I wanted to ask you, Professor, the last question is: efficiency—the trial, when you're dealing with serious constitutional questions on proposition 187, the whole issue of, for instance, that Texas case—I forget the name of it right now——

Mr. MAIER. *Plyler* v. *Doe.*

Mr. BERMAN. Right—exclusion of public—from public schools of people who did not come here legally—children who were not legally in the country here——

Mr. MAIER. Right.

Mr. BERMAN. I could see very lengthy trials involving rules of evidence in issues like that. I think of some of the—I think of the Los Angeles busing decision essentially involving a basic constitutional question, which involved months and months of trial on factual questions which the court needed to be able to make a judgment about whether, as applied, something was going to be constitutional or not. So I'm not so sure it's a straight, you know, motion for summary judgment, contest on the—contest of different legal theories. I think there are a lot of evidentiary questions which could come up at some of these hearings.

Mr. MAIER. That was the basis of my objection to 1170(a). This bill includes cases that require a trial to determine whether a State statute is unconstitutional as applied. I don't think that it's appropriate to include those cases.

Mr. BERMAN. All right. So you're saying, when the law is passed by the voters, if you're going to challenge it at that particular point,

go to a three-judge panel. But if you're going to wait for the first regulation under that law to be enforced——

Mr. MAIER. Sure.

Mr. BERMAN [continuing]. Go back to Federal district court.

Mr. MAIER. You don't go back at all. You start in Federal district court in that case.

Mr. BERMAN. Yes.

Mr. MAIER. Yes.

Mr. BERMAN. Yes.

Mr. MAIER. Exactly. It makes perfect good sense to me; otherwise, I wouldn't have proposed it.

Mr. BONO. Mr. Chairman, we have already accepted that change. I don't think you were here when I think we talked about that point.

Mr. BERMAN. All right. Oh, so—well, if that change is going to be made in this bill, then I want—I want to go not to a three-judge panel, but to a Federal district court to overturn some—or to affirm or to enjoin some law, I wait—I wait until its first application, its first act of enforcement, and then I undermine the whole effectiveness of your bill.

Mr. MAIER. But you would be, then, seeking to enjoin the application of the law to the particular individual in particular circumstances, not in general.

Mr. BERMAN. But, from that, you get—you get preliminary injunctions which go far beyond that individual——

Mr. MAIER. They may or may not. They have to be within the scope of the cause of action.

Mr. BERMAN. I think the plaintiff in that situation would be able to handle that action pretty easily.

Mr. MAIER. I think we have to deal with these in very specific hypotheticals rather than generalized statements because I don't doubt that there are some situations in which that's true. I also don't doubt there are some in which it is not. That's one of my problems with the first part of the bill.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. MOORHEAD. Are you through?

Mr. BERMAN. Oh, yes, I'm sorry, Mr. Chairman.

Mr. MOORHEAD. All right. The gentleman from Pennsylvania.

Mr. GEKAS. Yes, I thank the Chair.

I think we're losing sight a little bit, and this is what I want to try to direct to our distinguished witness: that the gentleman from California, the chief sponsor of this bill, places a high value on the results of a referendum where the people in that limited circumstance have the all-consuming right to express the will of the populace, the majority of a particular jurisdiction. And so in the arena of trying to determine the best procedure to follow, we must not lose sight of that, that this should be almost sacrosanct, the will of the people in the referendum.

My question to you now as to that is this: I think you mentioned in your oral statement—I can't find it in your written statement—that when the issue, even in a referendum, comes down to whether or not a stated legislative purpose in a referendum conflicts with a Federal law, an existing Federal law——

Mr. MAIER. A Federal statute.

Mr. GEKAS [continuing]. A Federal statute——

Mr. MAIER. Yes. I did not mention it in the written work.

Mr. GEKAS. Yes, that's what I thought. I didn't see it in here. That it may not be applicable to apply this three-judge panel to that jurisdiction, is that——

Mr. MAIER. By the terms of the statute as proposed, it applies only when the constitutionality of the statute is contested, not when the State statute conflicts with an existing Federal statute.

Mr. GEKAS. That's why you say it's narrow in scope?

Mr. MAIER. Exactly. Exactly.

Mr. GEKAS. But I take that to mean that that's a beneficial part of the bill; that's a valuable part of the thrust of this legislation, that we do narrow it to that——

Mr. MAIER. I think that's correct.

Mr. GEKAS. Yes. So——

Mr. MAIER. But when you find something that's——

Mr. GEKAS. It's a salutary feature of this bill that it's so narrow and that the gentleman from California, Mr. Bono, who proposes this, wants to resanctify the results of a referendum. And so if we narrow the jurisdictional appeal, as it were, of this question, that it should be applied only to the question inherent in the referendum——

Mr. MAIER. And there's a reason for that. When one finds State legislation unconstitutional, there is no remedy to that finding except the amendment of the Constitution or convincing the Federal courts to change their minds. When one finds that State legislation is inapplicable because it conflicts with Federal legislation, the Congresspersons and Senators from that State can seek to change the conflicting Federal legislation so that it no longer conflicts with the State statute.

When you constitutionalize a prohibition, you do much more than merely say a statute can't operate effectively in a particular case or even in general. What you say is that the prohibition is part of the Constitution. There are only two ways to change that. One is by changing the judicial interpretation and the other is by constitutional amendment.

Mr. BERMAN. Would the gentleman yield on that issue?

Mr. GEKAS. Yes, certainly.

Mr. BERMAN. If you file and you challenge it on constitutional grounds and on grounds that the State enactment that the voters have approved conflicts with the following 42 Federal laws, are you in the three-judge panel on all grounds, even—are you on—are you in there——

Mr. MAIER. Clearly not in the way in which the legislation is currently posited——

Mr. BERMAN. Why do you say that? Any action that is brought in or removed to a district court of the United States and the challenge of the constitutionality of a State law——

Mr. MAIER. Constitutionality of a State law, that's exactly——

Mr. BERMAN. Right, and now that's count one. Count 2 through 47 involve conflicts with Federal law——

Mr. MAIER. Right.

Mr. BERMAN [continuing]. And why this provision falls on that basis. Do you call that a constitutional challenge?

Mr. MAIER. No.

Mr. BERMAN. All right. Are all those counts in the three-judge panel as well?

Mr. MAIER. No.

Mr. BERMAN. You now split the lawsuit and send one count of it to the three-judge panel——

Mr. MAIER. Sure.

Mr. BERMAN [continuing]. And the other 38 to the—because many of the counts in Los Angeles do not involve the constitutionality of 187; they involve conflicts——

Mr. MAIER. I understand that. That's exactly right. And by this legislation——

Mr. BERMAN. So you have two trials at two different levels going on simultaneously——

Mr. MAIER. Sure. That, in fact, is not an unusual occurrence in the Federal/State system.

Mr. GEKAS. I have no further questions. I yield back the balance of my time.

Mr. MOORHEAD. Well, thank you. I recognize the gentleman from California, Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman.

Mr. Maier, I'd like to go ahead and continue in the vein of the last question.

Mr. MAIER. Of course.

Mr. BECERRA. We're now, as Mr. Berman just mentioned, we're now with the hypothetical where we have 42 different counts, 1 of which includes a constitutional count. Under the legislation, as you've advised, we could have a situation where we have two different courts, Federal courts, reviewing the legislation or the referenda, referenda passed by the voters of a particular State.

Are you aware of anything in the bill that provides for additional revenues for the Federal courts to pay for the cost of any additional judicial resources necessary to deal with the legislation, if it should pass?

Mr. MAIER. No, certainly not. In fact, of course, the cases that deal with the conflict between State law and Federal statutory law would appear in the courts in any event. So the legislation is not going to affect the cost of that at all. What we're talking about is whether existing judicial resources should be applied to this particular kind of a situation in which there is a constitutional challenge——

Mr. BECERRA. I understand.

Mr. MAIER [continuing]. To the validity of a State statute on its face. So the answer to your initial question is, absolutely no. There's nothing in the bill that provides additional money——

Mr. BECERRA. OK. So there is no——

Mr. MAIER [continuing]. If that's your question.

Mr. BECERRA. There is no money in the bill to pay for any additional resources that might be needed by the——

Mr. MAIER. No additional Federal judges are created with respect to this; that's correct.

Mr. BECERRA. But there are additional resources that will be necessary to empanel three-judge panels versus having one judge review a case; is that not correct?

Mr. MAIER. Well, I don't know. I don't know what the history is under U.S.C. 2284 since we already have legislation in which the use of three-judge panels is increased and since the estimate, as I understand it we'd be talking about 10 more three-judge panels over a period of 10 years if this legislation had been in effect during the last 10 years. We are obviously talking about an increase in the use of judicial resources if this legislation passes. There's no doubt about that. The question is, and this is a question, of course, that Congress has to answer—whether that increase—and I think it's a limited increase in the allocation of resources—is worth the result that you get under the bill. That of course, is a question that Congress has not addressed in the bill and which would be created by passing it.

Mr. BECERRA. And the result of the bill is, by having the three-judge panel review a case versus having one judge review the case, that you have a broader perspective provided by the judiciary in that initial review that is considered an important——

Mr. MAIER. I think that's true.

Mr. BECERRA [continuing]. An important matter.

Mr. MAIER. I think that's true.

Mr. BECERRA. Can you cite for us any particular evidence of abuse by one-judge hearings in the process of reviewing any referenda of different States?

Mr. MAIER. No, I cannot, but I can certainly tell you that there is a public perception that occurs which, whether erroneous or not, is important.

Mr. BECERRA. But should we be driving policy because of public perceptions?

Mr. MAIER. Of course. Congress derives policy by public perception all the time.

Mr. BECERRA. Should the judiciary be driven by public perception——

Mr. MAIER. Should what, please?

Mr. BECERRA. The judiciary be driven by public perception?

Mr. MAIER. Well, you know, Mr. Dooley said the Supreme Court always follows the election returns. I think that's an overstatement, but you cannot help but be a human being and live in this country, and have perceptions of what the public thinks of you. I do not think, however, that the judiciary in this country is generally driven by public perceptions of what they're doing. If I did, I think that I would be much more concerned about the forum shopping aspect of this than I am.

Mr. BECERRA. Let me ask you a question, another hypothetical. In this case you have a referendum that passes in a State by the narrowest of margins, less than a percentage point, 50.5 percent to 49.5 percent, let us say, or even something smaller than that, where we find that less than 40 percent of the voters go out and vote on election day. In essence, less than 50 percent or so of the eligible voters actually go out and vote, and certainly far less than 50 percent of those who are over 18 go out and vote. In that situation where you end up with a majority of votes on election day by a slim majority, which in its number constitutes a very small number of the total eligible population to vote in the State, is there still

the same intensity in the argument that this is something mandated by the people of the State?

Mr. MAIER. Let me say I don't know that it would be appropriate to diminish the value of a Congressperson's vote in Congress depending upon the percentage of persons in the State who had actually voted for him or for her. It would be nice if everybody voted. We know that there is, unfortunately, low turnout in elections for people who run for office. The logic of addressing the validity of this direct State referendum, by suggesting it has less validity because less than 50 percent of the people in the State voted for it, might indicate that we ought to follow that logic throughout the entire election system.

Mr. BECERRA. But we're talking about a situation here where you can go to court under different circumstances if you have a referendum that's passed. We're not talking about taking Members of Congress to court because they may have gotten elected by a small percentage of the people eligible to vote.

Mr. MAIER. No, but we are talking about is doing, in effect, the same thing; treating the legislation differently because of the percentage of the population that voted for it, either directly or indirectly. That's a dangerous road to go down, and I don't think that that's exactly what we're talking about. That's not what I'm talking about.

Mr. BONO. Would the gentleman yield?

Mr. BECERRA. I agree with you, and if—I will yield to the gentleman in a moment, if I can just clarify something with the professor. I don't believe anybody is saying that we should look at numbers, percentages of votes or of those eligible to vote to make determinations about how a law should be enforced or not enforced, but I do believe that if we're talking about an issue of changing current practices in the courts, if we're not aware of any abuse by the current system and if we're not providing for resources to pay for a change in the practice, which we know will cost more—how much more we don't know, whether it's small or large in amount—that we would want to have some further justification for the reason, if we're doing this because public perception has driven us to the point where we think we want to empanel three judges versus one judge to take a look at a referendum, that could be the will of the people and——

Mr. MAIER. That is one of the elements. Of course, we're talking about multiple elements in this legislation, aren't we?

Mr. BECERRA. That's correct.

Let me yield to the gentleman from California, my colleague.

Mr. BONO. Yes. If I understand what you're saying correctly, when you're talking about the number of votes adding credibility to the issue, am I hearing you correctly?

Mr. BECERRA. No, I was just trying to pose a hypothetical because what we're talking about quite a bit right now is the will of the people, and you have to some degree question what the will of the people is. It could be because we have a vote that, because in this society democracy by those who vote is the will of the people, if, in fact, that really does express the entire will of the entire body of people in the State that's in question here——

Mr. BONO. Well, would that reflect——

Mr. BECERRA. If I could just finish——

Mr. BONO [continuing]. In a Presidential election as well?

Mr. BECERRA. If I can just reclaim my time, all I'm saying is that if we're going to go beyond what I see as policy justifications for a change in our current practices, I think we should make a very strong case for the changes that may not be based on particular policy implications of the legislation.

I will yield again to the gentleman.

Mr. BONO. Again, I would just say, then Presidential elections would—you'd have to apply that as well?

Mr. BECERRA. Well, again, I'm not talking about electing individuals, and I think it's abhorrent that we don't have more people voting for our Presidents or our Members of Congress or any other person that's on the ballot. I'd like to see us increase the numbers. But I understand that what this legislation is trying to address is the fact that there are cases where the will of the people, so-called will of the people, is being at least temporarily thwarted by a court, a Federal court, which finds that there are grounds to enjoin the implementation of a referendum, which may be unconstitutional under the Federal Constitution, and I'm trying to figure out why we would want to change the process which, as I understand—I haven't heard any testimony say that there has been abuse of the process by the current system which allows for the most part a single judge to review those cases. And I'm trying to understand what the reason might be to change this beyond the fact that we're trying to somehow reflect the perception of the public that there may be some abuse.

Mr. BONO. Well, I don't necessarily agree that it's just the—just a public perception.

I guess my other point would be, you know, we're not talking about much here. We're talking about maybe, if the situation does exist, to help it a little bit at not really anybody's expense, and I can't understand why we would put up so much resistance to a notion like this to possibly improve it. There's no way that this could harm the situation, as I see it, and the ultimate would be that it would only improve it.

Mr. BECERRA. I yield back the balance of my time, Mr. Chairman.

Mr. BONO. Mr. Chairman.

Mr. MOORHEAD. Yes, the gentleman from California.

Mr. BONO. Can I enter into the record a statement of support from Attorney General Meese and a letter of support from Attorney General William Barr?

Mr. MOORHEAD. Yes, they're entered into the record.

Mr. BERMAN. What's the other one? Meese and who else?

Mr. BONO. Barr.

Mr. BERMAN. Barr?

[The prepared statement of Mr. Meese follows:]

Prepared Statement of Edwin Meese III, Ronald Reagan Fellow in Public Policy, the Heritage Foundation

I am happy to indicate my views concerning H.R. 1170, introduced by Congressman Bono and many of his colleagues, providing that cases challenging the constitutionality of state measures adopted by initiative or referendum be heard by a three-judge court. In doing so, I am testifying at the request of the author of this legislation.

In many States within our Country, specific constitutional authority has been retained by the people to adopt State laws or State constitutional amendments through the process of initiative or referendum. Since such processes are a direct means whereby the citizens of a state can express their will on public policy issues, great deference should be given to such action before a federal court can intervene to delay or obstruct the implementation of a vote of the people.

Too often opponents of an initiative or referendum measure, having been defeated at the ballot box, seek to negate the popular will by a resort to the federal courts. Sometimes the grounds for such litigation may be valid; often the basis is spurious, but the objective is achieved by finding a federal judge who is willing to delay or otherwise impede the fulfillment of the electoral process.

Implementing a measure approved by a majority, or in some cases a required higher proportion, of those voting should receive the highest respect by the federal judiciary. Thus it is appropriate that consideration of any challenge to such a measure receive the special consideration already given to other cases deemed by federal statute to be worthy of multi-judge proceedings.

H.R. 1170 fulfills this obligation by requiring that when any action is brought in or removed to a federal district court, challenging the constitutionality of a State law or State Constitutional Amendment adopted by initiative or referendum, the case must be heard and determined by a court of three judges, in accordance with section 2284 of title 28, United States Code. Furthermore, any appeal of such action would be to the Supreme Court. The Bill also specifies how the three judges would be designated, that such procedure would be accomplished as soon as practicable, and that this three-judge court shall act in an expeditious manner.

[The letter referred to follows:]

WILLIAM P. BARR
ONE STAMFORD FORUM
STAMFORD, CT 06904

April 3, 1995

Congressman Sonny Bono
U.S. House of Representatives
512 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman Bono:

I strongly support your proposal, H.R. 1170, which would require that cases in federal court challenging the constitutionality of measures passed by state referendum be heard by a three-judge court.

The dictates of federalism, as well as fundamental democratic principles, require that the law-making acts of states -- sovereigns of equal dignity to the federal government -- be accorded substantial deference. While not immune from review, state laws should not be casually struck down or enjoined. This is particularly true where the people have decided to take the extraordinary step of superceding normal representative mechanisms and directly expressing their will through a referendum. It is, therefore, troublesome that a single federal judge should be able, on his or her own, to set aside a state law adopted by referendum. Such action frustrates the most solemn expression of democratic will and fundamentally disrupts the process of government.

By requiring that at least two judges agree on a state law's unconstitutionality, H.R. 1170 establishes a safeguard against the potential that a single, perhaps idiosyncratic, judge can take unwarranted action that frustrates and disrupts democratic processes. After all, judges are merely human and make mistakes; that is why we provide multiple levels of review. Indeed, for this reason, Congress has provided for three-judge courts in other sensitive areas, such as voting rights cases and in challenges to the Gramm-Rudman Act.

H.R. 1170's safeguard of a three-judge court is fully appropriate given the extraordinary nature of popular referenda. Certainly, the "check" of a three-judge court is more warranted for state referenda than in the other contexts in which Congress currently provides this mechanism. Moreover, H.R. 1170 will minimize disruption and uncertainty by expediting the appellate process. Further, it will limit the opportunity for forum-shopping -- seeking out a particular judge thought to be favorably predisposed on a particular issue. Finally, H.R. 1170 limits itself to a narrow and extraordinary class of cases, and therefore should in no way prove burdensome to administer.

Sincerely,

William P. Barr

WPB/dh

Mr. MOORHEAD. Professor Maier, in your opinion, does the existence of the abstention doctrine provide adequate protection against the use of the three-judge court where statutes passed by the popular referendum are conditionally challenged or would the establishment of such panels contemplated in H.R. 1170 provide greater protection in balancing State and Federal interests?

Mr. MAIER. I don't think that the abstention doctrine is a very clear doctrine in Federal courts. I think most Federal judges would agree with me. And in its current context, is certainly not, I think, a substitute for this particular amendment. In fact, it addresses different kinds of things. The abstention doctrine is a doctrine which says that the Federal courts ought not to decide cases when certain issues are more appropriately addressed first in the State court.

I don't quite understand the question. Are you suggesting legislation that would improve or broaden the abstention doctrine as a substitute for this bill?

Mr. MOORHEAD. No, that wasn't exactly what we had in mind by that, but would the establishment of the panel provide a greater protection in balancing State and Federal interests than what we have at the present time?

Mr. MAIER. I don't think that establishment of a panel really addresses the balancing of the State and Federal interests. This is a point I wanted to make before Mr. Becerra left. We are really dealing with legislation that is passed without the same kind of presumed careful constitutional review by a legislature that applies to ordinary legislation before it's put on the books. And I'm not assuming that the legislation is bad legislation or good legislation, or, for that matter that the legislation would necessarily be struck down. I think that, regardless of whether the legislation is upheld or struck down, since there has been little or no opportunity for effective constitutional review in the legislative body before it is passed, that it's appropriate to have more than one judge make the determination about the constitutionality of that legislation. That's just as appropriate if the three-judge panel says this is fine legislation; there's nothing unconstitutional about it. When a constitutional ruling, pro or con is made, there is a presumption, both in the public mind and in a functional sense, that three judges rather than one have looked at the legislation and believe it is fully constitutional. You don't have such a presumption when the legislation is passed by referendum or by direct initiative, because you don't have that kind of constitutional review. There may be more prior legislative review with respect to a referendum because often a referendum is required to be submitted by the legislature itself. Certain issues must be submitted by referendum in some States. In those situations, you do have some prior constitutional review of the legislation. In effect, the legislature says, either way, it's fine; we can permit this sort of legislation to be voted on directly by the public.

I think that the utility of the three-judge court in a situation where the legislation has not passed through the filter of the legislature for review of constitutionality is much higher than it would be if, in fact, there had already been the opportunity for some prior constitutional review in the legislature.

My assumption is that we're not talking about a great increase in allocation of Federal judicial resources if this legislation is passed with the changes that I have suggested. Those changes would eliminate three-judge panels in cases challenging the way in which State legislation is applied; in other words, the change would keep the three-judge panel out of that kind of a situation.

Mr. MOORHEAD. You know, in most States that have the initiative process the people use the initiative as a way of getting the legislature to take action or as a defense against them not taking action in an area that they believe is important. Many times, however, if they get rejected, if they get rejected by a one-judge panel, they feel that some judge has used his own political prejudices in order to keep the people from having what they felt necessary for them to have; it discourages the initiatives for the future.

What effect do you think legislation of this kind has on that give and take between the two processes?

Mr. MAIER. You know, that's something I really would not care to speculate about because I suspect that that has more to do with the local political mores and attitudes of the State itself than it does with general attitudes throughout the United States. My own view is if I had gotten out and worked for a referendum or to put something on the ballot as an initiative, and then it were set aside by a single judge, I would feel much more upset than if I had at least two out of three judges saying initially, this legislation is unconstitutional and here is why.

But I wouldn't care to generalize about the utility of this particular legislation with respect to public attitudes about whether referenda are to be voted on or whether they shouldn't or whether voters actually go to the polls. We know that people have reactions about going to the polls depending upon how well they think their vote is reflected in what actually turns out to be the law, whether that's by referendum or whether it's by what their Congressperson does.

Mr. MOORHEAD. Professor Maier, you have been very, very patient. You've been here and you were the first witness and you're the last person here being interrogated, and it's been a long morning for you, I'm sure.

Mr. MAIER. It's always nice to be asked.

Mr. MOORHEAD. Did you have one more question?

Mr. BERMAN. Yes. Could you have a little more—just a little more patience? And I do appreciate the time you've given me, but this is interesting and it's an important issue, and I just want to explore it.

I still haven't had a chance really to read your testimony, but I've heard you respond and I have a sense of your position. You're saying you like this bill, but you want the following changes: you want it only applied to the challenge to the law itself on constitutional grounds, not to the law as applied on either constitutional——

Mr. MAIER. That's right.

Mr. BERMAN [continuing]. Grounds or to the law in theory—you don't want the three-judge panel applied to a challenge to the law as conflicting with a Federal law?

Mr. MAIER. It doesn't in its terms now apply to that. That's right.

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Mr. BERMAN. But what you have said, I take it you would support an amendment which would clarify that nonconstitutional Federal questions would be kicked out of three-judge court?

Mr. MAIER. Yes, sir. Absolutely.

Mr. BERMAN. All right. So——

Mr. MAIER. Absolutely. Because I think that raises exactly the kind of problem that you were talking about; that is, sometimes there is State legislation that is contrary to Federal legislation; sometimes there is State legislation that is contrary to the Constitution, and I don't see any problem with treating those two situations differently. The legislation in its current form does not require three-judge review when the issue is whether the State legislative enactment conflicts with existing Federal legislation, and I don't think it should.

Mr. BERMAN. All right. So here we have two different proposed amendments. I take it you would support a third proposed amendment which would change the definition of referendum to not cover those popularly-approved measures which the legislature placed on the ballot because in the legislative process they have the chance for the kind of review and refinement to deal with constitutional questions, and so we should exclude the legislatively-proposed popularly-adopted——

Mr. MAIER. I'm not sure about that because the ultimate responsibility then for the actual adoption of legislation falls on the public.

Mr. BERMAN. But you——

Mr. MAIER. Wait a minute. And, therefore——

Mr. BERMAN [continuing]. But you gave as your reason for wanting a three-judge panel that it didn't have a chance to go through the legislative process.

Mr. MAIER. Yes, if you'll let me finish, there's another element. There is lower internal pressure on the legislator who knows the ultimate enactment of the statute is going to be up to the public rather than to himself. This relieves, in some degree, the need to carefully consider the constitutionality of the legislation before it is submitted to the public.

Mr. BERMAN. Let me tell you that the—I'm here to tell you that, after 12 years, the one thing I'm convinced of is the fact that we know that the Court down there that will strike it down removes our willingness to exercise any serious rigor in looking at legislation to determine if it's constitutional or not——

Mr. MAIER. Even if you're passing the legislation? I mean, not you personally, but if the Congress——

Mr. BERMAN. Even as we attack the courts——

Mr. MAIER. Right.

Mr. BERMAN [continuing]. For being too judicially active——

Mr. MAIER. Yes, that's probably right. I think that the likelihood that, in fact, there is intensive constitutional review by legislative bodies is relatively slim. On the other hand, there is necessarily at least the obligation on the part of legislators to try to do so because legislators swear to uphold the Constitution of the United States, which seems to me to include at least not voting for legislation that they believe is unconstitutional.

Mr. BERMAN. My very last question: New York has no initiative, no referendum, no recall. California does. Since I'm sure you agree that even an overwhelming, passionate desire of the majority of the voters at a State level cannot abridge constitutionally-protected rights of individuals——

Mr. MAIER. Absolutely.

Mr. BERMAN [continuing]. And minorities——

Mr. MAIER. Or anybody else.

Mr. BERMAN. What you're saying, then, is in California if the voters want to pass a law that prohibits the State from interfering with their right to discriminate based on race in the sale of homes or in the—and let's leave out the Federal law issues for a second and just deal with the constitutional question. In California if they want to do that and they do that, that goes through one method of review. But in New York—but in New York, where the voters can't express that, the acts of discrimination of individuals will go through the New York remedies? In other words, you're going to have a different situation—maybe that isn't—that isn't a very good hypothetical, as I think about it.

But you have a bunch of States which don't have the initiative, don't have the referendum, and you're going to have a different way of testing serious constitutional questions in the Federal system in those States than you are in States which do.

Mr. MAIER. The substantive test would not be different, but the process by which that test is accomplished would be different; that's true. That's the price we pay for having a Federal Nation, isn't it, that we make different laws in different States? And, therefore, different approaches are taken in different——

Mr. BERMAN. Well, give me an example of where we make a different Federal process based on the different States.

Mr. MAIER. No, wait. We didn't make a different Federal process that is based on——

Mr. BERMAN. You are here.

Mr. MAIER. No, not at all. The same Federal process would apply in any instance in which a State legislature decides that it wants to adopt a referendum or initiative process for passing legislation. Similar States would be treated similarly. So there is no distinction between States. It's the State's choice as to whether it wishes to be treated differently.

Mr. BERMAN. Your point is well taken on that. The likelihood of a State in this—since Hiram Johnson left us—of a State legislature putting into place a process by which the initiative and referendum and recall will apply I think is—will happen right after they pass term limits on their own.

[Laughter.]

Mr. MAIER. That's a political issue, sir. I don't ever address those.

[Laughter.]

Mr. BERMAN. Thank you.

Mr. MOORHEAD. Thank you. This concludes our hearing on H.R. 1170. The record will remain open. I want to thank each one of you for your cooperation.

The subcommittee stands adjourned.

[Whereupon, at 12:16 p.m., the subcommittee adjourned.]

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